

**Deposition Excerpts of
Eric L. Talley, J.D., Ph.D**

(Dec. 8, 2013)

REDACTED VERSION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE)
ANTITRUST LITIGATION)
) No. 11-CV-2509-LHK
THIS DOCUMENT RELATES TO:)
ALL ACTIONS.)
_____)

VIDEO DEPOSITION OF ERIC L. TALLEY, J.D., PH.D.

DECEMBER 8, 2013

Reported by: Rosalie A. Kramm, CSR No. 5469, CRR

08:56:28 1 Q. And in that CV you describe work you have done
08:56:29 2 consulting with boards of directors, correct?

08:56:30 3 A. Among other things, yes.

08:56:31 4 Q. And you have -- it says here that in 2010, you
08:56:32 5 were retained as an expert consultant to provide
08:56:33 6 corporate governance training to the board of directors
08:56:35 7 of Senestech Incorporated; is that right?

08:56:36 8 A. That's correct, yes.

08:56:36 9 Q. And it also says that -- let's see. In 2007,
08:56:38 10 2008, you were retained by Marvell Technology Group to
08:56:39 11 provide corporate governance training to senior
08:56:40 12 executives and board relating to managerial oversight,
08:56:41 13 appropriate delegation, and conflicts of interest; is
08:56:42 14 that right?

08:56:43 15 A. That's correct.

08:56:43 16 Q. Can you describe the advice you provided to
08:56:44 17 those two companies.

08:56:45 18 MR. RUBIN: Well, I would just caution to the
08:56:45 19 extent there is privilege -- there is a privilege issue,
08:56:47 20 I would --

08:56:47 21 MR. HARVEY: Sure, let me --

08:56:47 22 MR. RUBIN: I mean I don't represent them,
08:56:47 23 obviously, but I would just -- I'm sure Professor Talley
08:56:49 24 knows that, too, but I just want to make sure he doesn't
08:56:50 25 disclose anything.

08:56:51 1 BY MR. HARVEY:

08:56:51 2 Q. And just so we're not crossing any boundaries
08:56:52 3 here, I'm not asking for anything specific about the
08:56:53 4 substance or anything confidential with respect to those
08:56:54 5 companies. I'm just asking you generally to describe for
08:56:55 6 the kind of advice or the categories of advice you
08:56:56 7 provided.

08:56:56 8 MR. RUBIN: If you can do that without
08:56:57 9 breaching confidentiality or privilege.

08:56:58 10 THE WITNESS: So in both of the instances you
08:56:59 11 mentioned, there -- there were sensitive issues that -- I
08:57:00 12 believe that the nature of the relationship was one of
08:57:01 13 trust and confidence, and I cannot divulge. So I can
08:57:02 14 only paint these in broad strokes.

08:57:03 15 BY MR. HARVEY:

08:57:03 16 Q. You know what, why don't I stop you there and
08:57:04 17 I'll just withdraw the question.

08:57:05 18 A. Okay.

08:57:05 19 Q. During the course of your -- of the work that
08:57:06 20 you did for Senestech, did you ever advise Senestech to
08:57:08 21 enter into a secret company-wide antisolicitation
08:57:09 22 agreement with another company, with no geographic limit,
08:57:10 23 no expiration date, and without regard to the categories
08:57:11 24 of work that the employees did?

08:57:13 25 MR. RUBIN: Objection. Form.

08:57:13 1 THE WITNESS: I don't believe that that was
08:57:14 2 part of our discussion. No.

08:57:14 3 BY MR. HARVEY:

08:57:15 4 Q. Did you ever advise Marvell Technology Group to
08:57:16 5 enter into such agreements?

08:57:16 6 MR. RUBIN: Same objection.

08:57:17 7 THE WITNESS: As per the same question you
08:57:18 8 asked earlier?

08:57:18 9 BY MR. HARVEY:

08:57:18 10 Q. Yes.

08:57:19 11 A. I don't believe that that was part of our
08:57:19 12 discussion. However, the discussion did involve issues
08:57:21 13 relating to -- let's see. HR and employment management,
08:57:22 14 generally. I can't get into more specifics. Sorry.

08:57:24 15 Q. And you mentioned -- and this is just in your
08:57:25 16 CV -- that among the categories was -- was appropriate
08:57:26 17 delegation and conflicts of interest.

08:57:27 18 Did you ever advise either of these companies
08:57:28 19 that agreements of that kind would be a good idea in
08:57:29 20 order to solve potential or actual conflicts of interest?

08:57:31 21 MR. RUBIN: Objection. Form.

08:57:31 22 THE WITNESS: Agreements of that kind is -- can
08:57:32 23 you --

08:57:32 24 BY MR. HARVEY:

08:57:33 25 Q. Sure. Agreements such as those at issue in

08:57:34 1 this case, that is secret company-wide antisolicitation
08:57:35 2 agreements with other companies, with no geographic
08:57:36 3 limit, no time limit, and no narrowing in terms of what
08:57:38 4 the employees subject to that agreement were working on
08:57:39 5 or what their titles were.

08:57:40 6 MR. RUBIN: Same objection.

08:57:40 7 THE WITNESS: Again, I want to be careful here
08:57:41 8 because of a -- of a confidence issue. The -- it is fair
08:57:43 9 to say that our discussions did involve issues that would
08:57:44 10 plausibly be related to confidentiality agreements
08:57:45 11 between companies, and that confidentiality agreements
08:57:46 12 might well have non-solicit provisions in them, and those
08:57:48 13 non-solicit provisions have many forms of -- of
08:57:49 14 application, including without restriction as to type of
08:57:50 15 employee.

08:57:51 16 BY MR. HARVEY:

08:57:51 17 Q. Which company are you referring to? Senestech
08:57:52 18 or Marvell Technology Group?

08:57:53 19 A. So these discussions did come up with the
08:57:54 20 Marvell.

08:57:54 21 Q. When you say "these discussions," you are
08:57:55 22 referring to discussions about agreements similar to
08:57:56 23 those at issue in this case?

08:57:57 24 MR. RUBIN: Objection to form.

08:57:58 25 THE WITNESS: I'm talking about agreements that

08:58:22 1 THE WITNESS: I don't know whether it is or is
08:58:23 2 not. Part of my caution is because of the fact that I
08:58:24 3 don't know whether it is or is not public -- public
08:58:25 4 knowledge. These sorts of agreements sometimes are
08:58:26 5 disclosed in securities filings. Sometimes they're not.
08:58:28 6 BY MR. HARVEY:

08:58:28 7 Q. And when you say "these kind of agreements,"
08:58:29 8 you mean company-wide antisolicitation agreements similar
08:58:30 9 to those at issue in this case are sometimes disclosed in
08:58:31 10 SEC filings? Is that your testimony?

08:58:32 11 A. You'll sometimes see them in the context of,
08:58:33 12 you know, maybe an M&A filing where they have a
08:58:35 13 confidentiality provision and a no -- or a
08:58:36 14 confidentiality agreement with a no solicit clause.
08:58:37 15 Sometimes you'll see them. Sometimes they are not
08:58:38 16 disclosed.

08:58:38 17 Q. Please identify every company that has
08:58:39 18 disclosed an antisolicitation agreement similar to those
08:58:40 19 at issue in this case in an SEC filing.

08:58:42 20 MR. RUBIN: Objection. Form.

08:58:42 21 THE WITNESS: Off the top of my head,
08:58:43 22 Mr. Harvey, I -- I can't name the companies. I have --
08:58:44 23 just in unrelated work, because I teach mergers and
08:58:45 24 acquisitions, and one of the parts of mergers and
08:58:47 25 acquisitions is -- is non-solicits and -- and

08:58:48 1 confidentiality agreements. So I have spent a fair
08:58:49 2 amount of time on EDGAR trying to pull documents related
08:58:51 3 to joint ventures, to joint investment projects to asset
08:58:52 4 sales to acquisitions that -- that have confidentiality
08:58:53 5 agreements as -- as some of the exhibits, and sometimes
08:58:55 6 you will see them. I'd say most of the time you do not,
08:58:56 7 but they will sometimes work their way into the filings
08:58:57 8 as an exhibit.

08:58:58 9 And I can't -- I cannot list off the top of my
08:58:59 10 head every company for which I have -- have examined
08:59:00 11 the -- the NDA and how many of them had -- I can give
08:59:02 12 estimates, but I don't have a compilation of quantitative
08:59:03 13 data in front of me.

08:59:04 14 BY MR. HARVEY:

08:59:04 15 Q. Can you identify a single one?

08:59:05 16 A. Not off the top of my head. If you give me
08:59:07 17 some -- a chance to think about it, I might -- I might
08:59:08 18 bring it up later on in the deposition.

08:59:09 19 Q. Sure. If at any point during the deposition
08:59:10 20 you think of one --

08:59:11 21 A. All right.

08:59:11 22 Q. -- just let me know.

08:59:11 23 A. Okay.

08:59:12 24 Q. You used the phrase "M&A" frequently in
08:59:13 25 describing this. Do you recall ever seeing an agreement

08:59:14 1 in a context outside of the merger context?

08:59:16 2 A. Yes, I've seen confidentiality agreements with
08:59:17 3 non-solicits in joint venture agreements, joint
08:59:18 4 investment agreements. There is a, you know, categorical
08:59:20 5 question of what constitutes, you know, mergers and
08:59:21 6 acquisition agreements when a lot of these things don't
08:59:22 7 involve change of control or transfer of shares or -- or
08:59:24 8 assets from one company to another. So I've seen them in
08:59:25 9 other contexts as well.

08:59:26 10 Q. And just so the record is clear, my question is
08:59:27 11 not about confidentiality agreements generally, and it is
08:59:28 12 not about a -- non-disclosure agreements generally, and
08:59:29 13 it is not about non-solicits generally. It is a very
08:59:31 14 specific question. And that is, whether agreements such
08:59:32 15 as those at issue in this case, as I've defined them,
08:59:33 16 that is company-wide antisolicit -- company-wide
08:59:34 17 antisolicitation agreements without any restriction in
08:59:36 18 terms of geography, with no time limit, and with no
08:59:37 19 narrowing in terms of categories of employees.

08:59:39 20 MR. RUBIN: Objection. Form.

08:59:39 21 THE WITNESS: Well, one thing to remember,
08:59:40 22 Mr. Harvey, is that -- and I'm trying to answer this --
08:59:41 23 the question here -- is that I'm referring to contracts
08:59:43 24 that have non-solicit provisions that have many of the
08:59:44 25 features that you refer to. The notion of, say, a joint

09:07:10 1 that right?

09:07:10 2 A. The Caltech class was in the economics
09:07:11 3 department. So oddly in Caltech they have -- they --
09:07:12 4 they merge a bunch of social science departments
09:07:13 5 together, but it is largely economics.

09:07:15 6 And I also, as I -- my last year at graduate
09:07:16 7 school I taught an intermedia microeconomics course,
09:07:17 8 which has a large dose of -- of industrial organization
09:07:18 9 in it as well.

09:07:19 10 Q. Have you ever taught a course in compensation
09:07:20 11 practices; that is, how firms compensate their employees?

09:07:22 12 A. Yeah. So one of the topics that -- that we
09:07:23 13 touch on in the corporate law class is -- is compensation
09:07:24 14 schemes, both of managerial level and -- and sort of how
09:07:25 15 it relates to -- to others. The compensation -- you
09:07:26 16 know, a class all about compensation schemes, I've not
09:07:28 17 taught a class that's directed only to that, but it does
09:07:29 18 sweep itself into -- to the -- to the basic corporate law
09:07:30 19 class pretty -- pretty frequently.

09:07:31 20 Q. And I believe you list business ethics as one
09:07:32 21 of your areas of expertise; is that right?

09:07:33 22 A. Yes.

09:07:33 23 Q. Have you ever taught a course in employee
09:07:34 24 recruiting?

09:07:35 25 A. I've not taught a course in employee

09:07:36 1 recruiting.

09:07:36 2 Q. Have you ever published a paper concerning
09:07:37 3 employee recruiting?

09:07:37 4 A. I believe that some of my papers have that
09:07:38 5 dimension to them, yes.

09:07:39 6 Q. And which papers are those?

09:07:40 7 A. So there is a 1998 Yale Law Journal piece on
09:07:41 8 corporate opportunities, which is sort of tied to
09:07:42 9 questions about employees with knowledge that -- that
09:07:42 10 might make them quite attractive to other firms and --
09:07:44 11 and, in fact, they may know more about how attractive --
09:07:45 12 you know, about one firm than another, but they -- you
09:07:47 13 know, the question is how do you design legal rules
09:07:48 14 around, you know, trying to achieve efficiency-enhancing
09:07:50 15 ends in those circumstances.

09:07:50 16 Q. And that paper is about the corporate
09:07:51 17 opportunities doctrine, is it not?

09:07:52 18 A. Correct.

09:07:52 19 Q. That paper did not assess strategies for
09:07:54 20 recruiting from an HR perspective, for instance, correct?

09:07:55 21 A. Well, it might have. It might have. I mean to
09:07:56 22 the extent that the employee who possesses the knowledge
09:07:58 23 of the corporate opportunity or the employee -- maybe the
09:07:59 24 corporate opportunity herself. The -- the approach by
09:08:00 25 which she would be lured away could very well be through

09:08:01 1 an HR recruiting approach.

09:08:02 2 It wasn't about how to design an -- you know, a
09:08:03 3 human resources office or -- or, you know, the best way
09:08:05 4 for formal versus informal recruiting or recruiting
09:08:06 5 versus referrals. But -- but it -- it was, I think,
09:08:08 6 palpably about, you know, when someone would stay inside
09:08:09 7 a firm, when they would leave.

09:08:10 8 Q. As it relates to the corporate opportunity
09:08:11 9 doctrine.

09:08:11 10 A. Yes, in this instance, yes.

09:08:12 11 Q. Aside from that article, can you point me to
09:08:13 12 any others?

09:08:14 13 A. Off the top of my head, no, but I can
09:08:15 14 certainly -- I suspect there are others in there as well.
09:08:16 15 I just --

09:08:17 16 Q. Well, if you see any, let me know.

09:08:18 17 A. Okay. Fair enough.

09:08:19 18 Q. And have you ever published on the topic of
09:08:20 19 employee/employer non-compete agreements?

09:08:21 20 A. Let me see. I believe I have a working --
09:08:22 21 unpublished working paper that is on that, and I think it
09:08:24 22 probably -- and there probably has been some discussion
09:08:25 23 in a few of these articles about non-competes, too. I
09:08:27 24 would have to look through these to find exactly where
09:08:28 25 they are, though.

09:08:28 1 Q. Is it the principal subject matter of any of
09:08:30 2 your papers?

09:08:31 3 MR. RUBIN: Objection. Form.

09:08:31 4 THE WITNESS: Well, I think it might be. I
09:08:32 5 mean take this -- this corporate opportunities paper,
09:08:33 6 there is a -- you know, one of the things that -- that
09:08:34 7 this paper is about is how do you -- you know, what is
09:08:36 8 the structure that you would set up from an
09:08:37 9 efficiency-enhancing perspective if you wanted to -- to
09:08:38 10 both protect the nature of the information that -- that
09:08:39 11 was proprietary to the employer as well as to give the
09:08:41 12 employee options about -- about staying in the firm
09:08:42 13 versus leaving. So, you know, I think that that paper
09:08:44 14 has got a lot of hallmarks about it. It is broader than
09:08:46 15 that, though, as well. It could be other forms of
09:08:47 16 business opportunity that aren't related directly to
09:08:48 17 employment.

09:08:49 18 So I would characterize that one as, you
09:08:50 19 know -- if, in fact, suppose, you know, Harvey is
09:08:51 20 required to pay some liquidated damages provision upon
09:08:52 21 leaving, he -- that would be potentially a form of -- of
09:08:54 22 deterrence from -- from leaving to go work for someone
09:08:55 23 else, and that could have -- that could be interpreted
09:08:57 24 sometimes as a non-compete.

09:08:58 25 THE VIDEOGRAPHER: Less than a minute. Should

09:08:58 1 we go off the record?

09:08:59 2 MR. HARVEY: Yes, we have to.

09:09:00 3 THE VIDEOGRAPHER: We're now off the record at
09:09:01 4 10:08 a.m.

09:09:01 5 (Recess was taken.)

09:09:02 6 THE VIDEOGRAPHER: This is Tape 2 of the
09:09:03 7 deposition of Dr. Eric Talley. We're now on the record
09:09:04 8 at 10:17 a.m.

09:09:05 9 BY MR. HARVEY:

09:09:05 10 Q. When we -- before the break, we were talking
09:09:06 11 about your article, "Turning Servile Opportunities to
09:09:07 12 Gold"; is that right?

09:09:08 13 A. Yes.

09:09:08 14 Q. And I believe you were -- you were explaining
09:09:09 15 how in your view one could apply that article to the
09:09:10 16 context of employee/employer non-compete agreements, and
09:09:12 17 my question is not whether something you've written could
09:09:13 18 be applied to that context. My question was different.
09:09:14 19 And that is, have you ever written an article where that
09:09:15 20 was a principal subject matter of the piece?

09:09:17 21 A. That was the only subject matter of the piece?

09:09:18 22 Q. Was the principal subject matter.

09:09:19 23 A. I believe the article -- yeah, I'll -- I'll
09:09:20 24 stick with my earlier question -- or answer that -- that
09:09:21 25 I believe that non-competes are an application of many of

09:09:23 1 the articles I've written. I don't believe that I've --
09:09:24 2 I've published an article that is solely about
09:09:25 3 non-competes.

09:09:26 4 Q. Okay. Have you ever taught your students that
09:09:27 5 it would be a good idea to enter into agreements such as
09:09:28 6 those at issue in this case?

09:09:29 7 MR. RUBIN: Objection. Form.

09:09:30 8 THE WITNESS: That -- a non-solicit agreement?

09:09:31 9 BY MR. HARVEY:

09:09:31 10 Q. Without retreading all that water --

09:09:32 11 A. Yeah.

09:09:32 12 Q. -- the non-solicits as we -- on that page on
09:09:33 13 which we both decided we were on?

09:09:34 14 A. Let me see if I can -- I'll give you an answer
09:09:35 15 and let's see if this works.

09:09:36 16 Q. Okay.

09:09:36 17 A. I have in many occasions taught my students
09:09:37 18 that it is important to consider executing a non-solicit,
09:09:38 19 either as an agreement or a term of an agreement in
09:09:40 20 certain types of matters.

09:09:41 21 Q. And what would those matters be?

09:09:41 22 A. Usually matters that involve either very
09:09:42 23 sensitive proprietary information about business
09:09:43 24 strategy, governance, regulatory compliance, technical
09:09:45 25 knowledge; or sensitive -- sensitive assets that the

09:09:46 1 employer has built up by, say, investing in -- in the
09:09:48 2 human capital of its own employees, are some of the
09:09:50 3 examples where a non-solicit might make a great deal of
09:09:51 4 sense in conjunction with some -- some sort of, you know,
09:09:52 5 collaborative relationship or negotiation.

09:09:53 6 Q. And when you say "non-solicit," is that your
09:09:54 7 shorthand for non-solicit that has the terms that we
09:09:56 8 agreed on earlier?

09:09:56 9 A. Yes.

09:09:57 10 Q. So you've advised your students to enter into
09:09:58 11 agreements such as that in certain circumstances; is that
09:09:59 12 right?

09:09:59 13 MR. RUBIN: Objection. Form.

09:10:00 14 THE WITNESS: I have informed my students that
09:10:01 15 this can sometimes be a good idea. There may be other
09:10:02 16 ways to deal with some of these sensitivities, but -- but
09:10:03 17 in areas where you are dealing with negotiations or joint
09:10:05 18 projects or collaborations that have these forms of
09:10:06 19 sensitivities, non-solicits can be one of many different
09:10:07 20 ways to proceed in a sensible fashion.

09:10:08 21 BY MR. HARVEY:

09:10:09 22 Q. Have you ever advised your students to ignore
09:10:10 23 the antitrust laws?

09:10:11 24 MR. RUBIN: Objection. Form.

09:10:11 25 THE WITNESS: I have not.

09:10:11 1 BY MR. HARVEY:

09:10:12 2 Q. When you are telling your students that
09:10:12 3 agreements like this would be a good idea, do you tell
09:10:13 4 them about the Department of Justice investigation that
09:10:16 5 preceded this action?

09:10:16 6 A. This -- my involvement in this case is a month
09:10:17 7 old. I last taught a class that -- that pertained to
09:10:19 8 this in the spring of 2013. This case didn't come up in
09:10:20 9 that instance. But, you know, there is a unit in the
09:10:22 10 class on confidentiality agreements, and we discussed
09:10:23 11 non-solicits as part of that.

09:10:24 12 Q. When was -- well, first let me say, are you
09:10:25 13 aware sitting here that the Antitrust Division of the
09:10:26 14 United States Department of Justice conducted an
09:10:27 15 investigation into the conduct at issue in this civil
09:10:28 16 case?

09:10:29 17 A. Yes, I am aware of that.

09:10:30 18 Q. When was that investigation first made public?

09:10:31 19 MR. RUBIN: Objection. Form.

09:10:31 20 THE WITNESS: I did not investigate this.

09:10:32 21 I'm -- I think it probably was a few years ago.

09:10:33 22 BY MR. HARVEY:

09:10:33 23 Q. And this advice to your students, did that take
09:10:35 24 place before or after that was made public?

09:10:36 25 A. The advice that --

09:10:36 1 Q. That it would be a good idea to enter into
09:10:37 2 agreements like this?

09:10:38 3 A. That is not --

09:10:38 4 MR. RUBIN: Objection. Form.

09:10:39 5 THE WITNESS: Sorry. The -- what you
09:10:39 6 characterized as advice, I'm going to recharacterize as
09:10:41 7 what I present to my students, which is that non-solicit
09:10:42 8 agreements can be -- can play a helpful role in
09:10:43 9 facilitating various types of collaborative relationships
09:10:45 10 or negotiations under the appropriate circumstances. All
09:10:47 11 right? But this should not be understood as advising
09:10:48 12 them to get into such agreements willy nilly.

09:10:49 13 BY MR. HARVEY:

09:10:49 14 Q. Are you aware that there was a consent decree
09:10:50 15 entered in the DOJ case that was entered as a final
09:10:52 16 judgment in the district of DC?

09:10:53 17 A. I'm aware of this, yes.

09:10:54 18 Q. But you haven't reviewed it, correct?

09:10:55 19 A. I haven't spent -- I may have glanced at it,
09:10:56 20 but I didn't spend any appreciable time with it.

09:10:57 21 Q. Are you aware that that consent decree lays out
09:10:59 22 the circumstances under which non-solicits may or may not
09:11:00 23 be appropriate when formed in conjunction with specific
09:11:01 24 collaborations?

09:11:02 25 MR. RUBIN: Objection. Form.

09:11:02 1 THE WITNESS: I'm aware that the -- the consent
09:11:03 2 decree -- who drafted it, I do not know, and I am aware
09:11:05 3 that it lays out some parameters. I am not aware that it
09:11:07 4 is a set of parameters that speaks generally to when
09:11:08 5 something is appropriate or not. It -- it -- my sense is
09:11:09 6 that it's a settlement, and it was brokered by some
09:11:11 7 lawyers who I do not know.

09:11:12 8 BY MR. HARVEY:

09:11:12 9 Q. Do you understand that all the defendants in
09:11:13 10 this case agreed to that final judgment?

09:11:14 11 A. I believe I -- yes, I believe I've seen
09:11:15 12 reference to that, yeah.

09:11:16 13 Q. And do you understand that that final judgment
09:11:16 14 was entered by the judge in that action?

09:11:18 15 MR. RUBIN: Objection. Form.

09:11:19 16 THE WITNESS: I haven't seen evidence one way
09:11:19 17 or the other to that, but we can stipulate.

09:11:21 18 BY MR. HARVEY:

09:11:21 19 Q. Is there a reason why you didn't read that
09:11:22 20 document?

09:11:22 21 MR. RUBIN: Objection. Form.

09:11:23 22 THE WITNESS: I was asked to review the nature
09:11:24 23 of the agreements between around 2005 and 2009. The
09:11:25 24 consent decree itself is a legal document. My -- my
09:11:26 25 understanding of my engagement in this case was to

09:11:27 1 discuss the governance and -- and efficiency implications
09:11:29 2 of these -- of these sorts of agreements.

09:11:30 3 Whether a judge or parties to an action that is
09:11:31 4 not this one have settled on wording doesn't strike me as
09:11:33 5 directly pertinent to the question of what are the
09:11:34 6 economic rationales for or against these types of
09:11:35 7 provisions.

09:11:35 8 BY MR. HARVEY:

09:11:35 9 Q. Dr. Marx spent some time in his report applying
09:11:36 10 the conditions in the consent decree --

09:11:37 11 A. Yes.

09:11:38 12 Q. -- to the facts of this case, correct?

09:11:39 13 A. I believe he spent some time doing that, yes.

09:11:40 14 Q. And you reviewed his report, correct?

09:11:41 15 A. I did.

09:11:41 16 Q. But you didn't see fit to read the consent
09:11:42 17 decree, correct?

09:11:43 18 MR. RUBIN: Objection. Form.

09:11:43 19 THE WITNESS: Like I said, I think I have -- I
09:11:44 20 glanced at it but I did not spend that much time with it.
09:11:45 21 I spent a fair amount of time with Marx' report and --
09:11:46 22 and engaged it to the extent that I thought necessary.

09:11:48 23 BY MR. HARVEY:

09:11:48 24 Q. I understand you didn't advise your students to
09:11:49 25 enter into these things. You were telling them that they

09:11:50 1 may or may not be appropriate and they can do what they
09:11:52 2 want.

09:11:52 3 Did you give them the consent decree from the
09:11:53 4 DOJ case as a guide in terms of when it may or may not be
09:11:55 5 appropriate to enter into such agreements?

09:11:56 6 MR. RUBIN: Objection. Form.

09:11:57 7 THE WITNESS: As I said before, this case has
09:11:58 8 not been part of what I present to my students in -- in
09:11:59 9 class. It might become part of it. It's a -- you know,
09:12:01 10 it has got some interesting facts associated with it, but
09:12:02 11 thus far it hasn't been a part of it, and -- and, you
09:12:04 12 know, my dive into the facts of this case, you know,
09:12:05 13 started largely when I was contacted by Google counsel.

09:12:07 14 BY MR. HARVEY:

09:12:07 15 Q. At the outset I believe you -- you described
09:12:08 16 your principal expertise to be the economic analysis of
09:12:09 17 legal rules; is that correct?

09:12:10 18 A. Yes.

09:12:11 19 MR. RUBIN: Objection. Form.

09:12:11 20 BY MR. HARVEY:

09:12:11 21 Q. And the conditions laid out in the consent
09:12:12 22 decree are a set of rules, are they not?

09:12:14 23 A. Correct.

09:12:14 24 Q. Okay. Have you ever yourself managed a
09:12:15 25 technical collaboration?

09:12:16 1 A. Can we define exactly what you mean by that.

09:12:17 2 Q. Do you have an understanding of the phrase
09:12:18 3 "technical collaboration"?

09:12:19 4 A. I have an operating one in the -- in the
09:12:20 5 report.

09:12:20 6 Q. And what is that operating definition?

09:12:21 7 A. I'd have to look at the precise terms. I --
09:12:23 8 Professor Marx himself doesn't define this in his report,
09:12:24 9 so I was trying to get a sense of -- of what his -- his
09:12:25 10 meaning might be. I took it to be something like
09:12:27 11 software compatibility issues in this -- in this context.

09:12:28 12 Technical collaborations, you know, let's -- we
09:12:30 13 can draw domain about it, and I can tell you "yes" or
09:12:31 14 "no." It is certainly the case that I have overseen
09:12:32 15 fairly significant projects involving multiple people
09:12:34 16 sometimes from multiple places that are each contributing
09:12:35 17 data, data analytics, programming to a project that I'm
09:12:37 18 overseeing or helping to oversee.

09:12:38 19 Q. And these are research or academic projects?

09:12:39 20 A. Most of these are research or academic
09:12:40 21 projects, yeah.

09:12:40 22 Q. And are there any other types of projects that
09:12:42 23 you would characterize as a collaboration? And I should
09:12:43 24 qualify it; this is not joint projects that are contained
09:12:44 25 within a single firm or institution such as the

09:33:30 1 depends. They are quite plausibly linked to one another.
09:33:31 2 The one way that, you know, we talked earlier about
09:33:33 3 non-solicitation provisions, and one could imagine
09:33:34 4 different ways that a non-solicit might work. One is in
09:33:35 5 a particular discrete one-off transaction or one-off
09:33:36 6 project in which that seems to be the only likely
09:33:38 7 interaction that the parties are going to have.

09:33:39 8 The other might be as a -- kind of a master
09:33:40 9 agreement that sets the -- sets the ground rules for an
09:33:41 10 ongoing form of collaboration.

09:33:42 11 And my sense is that -- that these DNCC alleged
09:33:44 12 agreements are plausibly linked to a host of other
09:33:45 13 collaborative relationships that are memorialized in a
09:33:46 14 set of contracts.

09:33:47 15 Q. I understand that you have opinions about the
09:33:47 16 plausible --

09:33:48 17 A. Yes.

09:33:48 18 Q. -- linkage. And that is not my question.

09:33:49 19 A. Yes.

09:33:49 20 Q. My question is about -- it is a matter of -- I
09:33:50 21 will put it this way, contract law. Looking at that
09:33:52 22 agreement, when it was entered, in February 2005,
09:33:53 23 whenever, you know -- the moment when an agreement arose,
09:33:55 24 was it a term of that agreement to exchange confidential
09:33:56 25 information in some way and providing a process for that

09:33:57 1 exchange?

09:33:58 2 MR. RUBIN: Objection. Form.

09:33:58 3 THE WITNESS: So I -- I would rather answer in
09:33:59 4 terms of the economic function.

09:33:59 5 BY MR. HARVEY:

09:34:00 6 Q. I'd prefer you answer my question.

09:34:01 7 A. Okay.

09:34:01 8 MR. RUBIN: I think what he was saying was
09:34:02 9 rather, that's the way he could answer. So go ahead,
09:34:03 10 professor.

09:34:04 11 THE WITNESS: Let's start with my intended
09:34:05 12 answer and maybe we can work our way around this.

09:34:05 13 BY MR. HARVEY:

09:34:06 14 Q. I would really prefer you just answer my
09:34:06 15 question.

09:34:06 16 MR. RUBIN: Well, I think he is going to try.

09:34:07 17 THE WITNESS: I will attempt to answer your
09:34:08 18 question, but I need to have your question now repeated
09:34:09 19 to me.

09:34:10 20 MR. HARVEY: Okay. Can you please re-read the
09:34:10 21 question.

09:34:11 22 (Record was read.)

09:34:11 23 THE WITNESS: I see. So I don't believe that
09:34:12 24 the way that the alleged agreements have been announced,
09:34:13 25 that they specifically talked about various confidential

09:34:14 1 exchanges of information. It is plausible that these
09:34:15 2 were -- and I think kind of likely, that these were
09:34:17 3 related to facilitating those forms of exchange.

09:34:18 4 BY MR. HARVEY:

09:34:18 5 Q. Okay.

09:34:19 6 A. But they weren't -- it wasn't about a one --
09:34:19 7 here is the project, here is how we are going to
09:34:21 8 exchange, here are the four employees that are critical,
09:34:22 9 and we are going to wrap a -- you know, a ribbon around
09:34:24 10 that, and that's going to be the nature of the DNCC.
09:34:25 11 I -- I viewed the DNCC as being facilitating of these
09:34:27 12 other relationships.

09:34:27 13 Q. I understand. I understand that opinion.

09:34:28 14 Now let's look at it from the individual
09:34:29 15 agreements that you say were facilitated by the
09:34:30 16 do-not-call agreement at the outset.

09:34:31 17 Have you looked at those agreements in terms of
09:34:32 18 how they're memorialized in the contract that you cite?

09:34:34 19 A. So I've looked to a number of different
09:34:35 20 agreements. I don't think I caught them all, quite
09:34:36 21 frankly, but I wanted to get a sense of the -- you know,
09:34:38 22 the nature of the interaction between -- between Google
09:34:39 23 and Apple.

09:34:39 24 There were some that predated the -- the
09:34:40 25 relationship. You know, many of the footnotes here

09:34:42 1 dropped on page 14 are reflections of reviewing various
09:34:43 2 types of collaborative agreements between Apple and --
09:34:45 3 and Google.

09:34:45 4 Q. Is it your opinion that as a matter of
09:34:46 5 contract, that these subsequent agreements, these more
09:34:47 6 individual agreements, were part of that initial
09:34:48 7 agreement?

09:34:49 8 MR. RUBIN: Objection to form.

09:34:49 9 BY MR. HARVEY:

09:34:49 10 Q. In the sense that they are all part of the same
09:34:50 11 global agreement?

09:34:51 12 MR. RUBIN: Sorry. Objection to form.

09:34:52 13 THE WITNESS: So this could well just be a
09:34:52 14 discussion of a legal conclusion about what constitutes a
09:34:54 15 contract or not. And that's probably for a court to
09:34:55 16 decide on some level.

09:34:55 17 But it -- it is my opinion that these -- that
09:34:57 18 the existence of a do-not-call -- cold call agreement,
09:34:58 19 possibly -- maybe one way, maybe two ways, can facilitate
09:35:00 20 the existence of many types of prospective collaboration
09:35:01 21 that involve exchanges of information or other forms of
09:35:03 22 confidential proprietary knowledge or know-how.

09:35:04 23 BY MR. HARVEY:

09:35:04 24 Q. In your review of -- well, first let me back
09:35:05 25 up.

09:42:05 1 agreement ever occurred?

09:42:05 2 A. I don't believe I have.

09:42:06 3 Q. Okay. Okay. If you can go to page 11 and
09:42:07 4 paragraph 32, please.

09:42:08 5 A. Got it.

09:42:08 6 Q. There -- again in the penultimate sentence, you
09:42:09 7 list as -- as potential negative consequences to the
09:42:11 8 absence of a do-not-call agreement that the participants
09:42:12 9 might, quote, "develop wasteful incentives to curtail
09:42:14 10 investments in their employees' skills, to ration
09:42:15 11 employees access to proprietary information, or to limit
09:42:16 12 collaborators access to the most valuable employees and
09:42:17 13 other corporate resources."

09:42:18 14 Do you see that?

09:42:19 15 A. Yes.

09:42:19 16 Q. Have you seen any evidence to suggest -- and I
09:42:20 17 want you to be specific here, about a specific
09:42:21 18 collaboration, that occurred prior to 2005, in which the
09:42:22 19 participants developed wasteful incentives to curtail
09:42:24 20 investment in their employees' skills?

09:42:25 21 MR. RUBIN: Objection. Form.

09:42:25 22 THE WITNESS: So the -- I can probably answer
09:42:26 23 that -- what would I call it, the contra-positive of this
09:42:28 24 question. The -- the pre-2005 is a period before the
09:42:29 25 alleged DNCC agreements came into existence.

09:42:30 1 One potential adverse effect is that it may
09:42:32 2 limit the depth and scope and intensity of a
09:42:33 3 collaboration. I have not tried to measure the depth or
09:42:34 4 scope, but there is evidence that when the DNCCs are in
09:42:36 5 existence, people complain about, hey, listen, I sent you
09:42:37 6 my best guy, and you just stole him away. I -- it's --
09:42:39 7 I'm trying to imagine whether such a document would exist
09:42:40 8 before the alleged DNCCs came into existence.

09:42:42 9 BY MR. HARVEY:

09:42:42 10 Q. So you have not, as an empirical matter,
09:42:43 11 determined whether any of the collaborations that existed
09:42:45 12 prior to 2005 developed a -- wasteful incentives among
09:42:46 13 the collaborators to curtail investments in their
09:42:47 14 employees' skills?

09:42:48 15 A. I have not. I believe it also would be a very
09:42:49 16 difficult thing to quantify if -- directly. It's a -- it
09:42:50 17 is essentially trying to quantify the dog that doesn't
09:42:52 18 bark.

09:42:52 19 Q. And the same is true after 2009, correct? That
09:42:53 20 you have not conducted -- or you -- you don't know
09:42:54 21 empirically whether the collaborations that occurred
09:42:56 22 after the agreements ended developed wasteful incentives
09:42:57 23 to curtail investments in their employees' skills.

09:42:58 24 A. I -- I curtailed my analysis at 2009 when the
09:42:59 25 DNCCs -- alleged DNCCs were to have come to an end. So I

09:43:01 1 wasn't -- you know, I don't think my report talks about
09:43:02 2 collaborations afterward.

09:43:03 3 I have seen some evidence of some -- some
09:43:04 4 collaborations, but I didn't do a detailed analysis of
09:43:05 5 that post-2009.

09:43:05 6 Q. So you didn't analyze the post-conspiracy
09:43:06 7 period, correct?

09:43:07 8 A. I did not analyze the -- the -- the period that
09:43:08 9 is after the alleged conspiracy, correct.

09:43:09 10 Q. Okay. Is your answer the same for the
09:43:10 11 preconspiracy period? Did you analyze that?

09:43:11 12 A. A little bit. Part of the -- part of the
09:43:12 13 reason to analyze a little bit of the preconspiracy
09:43:14 14 period or the alleged conspiracy period is to get a sense
09:43:15 15 about whether the relationship between two parties to one
09:43:16 16 of these alleged agreements was -- was growing,
09:43:18 17 whether -- where they were becoming more involved with
09:43:19 18 one another on a -- on multiple collaborative prospective
09:43:20 19 and realized collaborative venues.

09:43:21 20 So, for instance, I think somewhere in the
09:43:23 21 report I note that collaboration between Apple and Google
09:43:24 22 started as early as 2002, but then, you know, picked up
09:43:26 23 as well. And -- and there were significant numbers of
09:43:27 24 collaborations after the alleged DNCCs were to have --
09:43:28 25 alleged to have begun in 2005.

09:43:29 1 Q. You know, that leads me to another question I
09:43:30 2 have.

09:43:30 3 Are you offering an opinion that the
09:43:31 4 collaborations that Google had with other defendants
09:43:32 5 picked up after 2005?

09:43:33 6 MR. RUBIN: Objection. Form.

09:43:33 7 BY MR. HARVEY:

09:43:34 8 Q. Or increased in some way. I think you used the
09:43:35 9 phrase "picked up," but however you want to describe it.

09:43:36 10 A. All I am saying is that DNCCs can facilitate
09:43:38 11 the -- the -- both the intensity and the extensiveness of
09:43:39 12 collaborations between -- between the parties. It is a
09:43:41 13 perfectly plausible and sensible economic justification,
09:43:42 14 and that is an efficiency-enhancing justification for
09:43:43 15 them.

09:43:43 16 Q. I understand that. But I think you said that
09:43:44 17 maybe 30 times, and I haven't asked you about that.

09:43:45 18 A. Thirty-four times.

09:43:46 19 Q. So I understand that you want to get it out
09:43:46 20 there, and you have. My question is different.

09:43:47 21 My question is whether you have done an
09:43:48 22 empirical assessment to determine whether the
09:43:49 23 collaborative activity that Google had with the other
09:43:51 24 defendants materially increased after 2005 --

09:43:51 25 A. Yes.

09:43:52 1 Q. -- as compared to before 2005.

09:43:53 2 A. I have not tried to do that empirical
09:43:53 3 quantitative assessment. The -- it would be challenging
09:43:55 4 on a number of different grounds. It is not just a
09:43:56 5 counting exercise of how many collaborative agreements
09:43:58 6 did they enter into. There may be informal collaborative
09:43:59 7 relationships that are entered into.

09:44:01 8 The intensity of those relationships would have
09:44:02 9 to be measured. So it's a -- it is a very difficult
09:44:03 10 empirical puzzle. I have not tried to do an empirical
09:44:05 11 assessment, but I just flagged that it would be a
09:44:06 12 challenging thing to do.

09:44:07 13 MR. HARVEY: I think we are five minutes away
09:44:08 14 from lunch, and so rather than plowing through for
09:44:09 15 another half hour, I'm inclined to take a break for lunch
09:44:10 16 now, if that is okay with you guys.

09:44:12 17 MR. RUBIN: You mean five minutes away from...

09:44:13 18 THE WITNESS: You are ordering in?

09:44:13 19 MR. RUBIN: That is fine.

09:44:14 20 THE WITNESS: Fine by me.

09:44:14 21 THE VIDEOGRAPHER: We are now off the record at
09:44:15 22 12:23 p.m.

09:44:15 23 (Luncheon recess was take.)

10:17:13 24 THE VIDEOGRAPHER: This is Tape 4 of the
10:17:14 25 Deposition of Dr. Eric Talley. We're now on the record

10:17:18 1 at 1:17 p.m.

10:17:22 2 MR. HARVEY: For the record, during the break
10:17:24 3 counsel for plaintiffs identified that what had been
10:17:26 4 marked as Exhibit 2921, which is Dr. Talley's report,
10:17:30 5 inadvertently included the highlighting. Counsel for
10:17:35 6 defendants have agreed to swap out that exhibit with a
10:17:42 7 version that does not have that highlighting.

10:17:45 8 Is that correct, Mr. Rubin?

10:17:47 9 MR. RUBIN: Yes, that's correct.

10:17:49 10 MR. HARVEY: Thank you.

10:17:51 11 Q. Dr. Talley, did you review contracts produced
10:17:56 12 by the defendants that memorialized certain
10:17:59 13 collaborations?

10:17:59 14 A. I believe I did, yes.

10:18:01 15 Q. Okay. Did you see in any of the contracts you
10:18:05 16 reviewed a reference to the do-not-call agreements at
10:18:08 17 issue in this case?

10:18:11 18 A. I don't believe I did. They may -- it may be
10:18:15 19 in there, but I don't believe I saw it.

10:18:17 20 Q. Okay. Could you go to page 11 of your report.

10:18:26 21 A. Sure.

10:18:27 22 Q. And specifically paragraph 33.

10:18:37 23 A. Got it.

10:18:37 24 Q. Okay. And I'm going to direct your attention
10:18:46 25 to the penultimate sentence, they are always the

10:18:48 1 penultimate sentence, in paragraph 33 where you say,
10:18:53 2 quote, "A telling measure of consensus best practices is
10:18:56 3 provided --" oh, scratch that.

10:19:00 4 Beginning with, quote, "Prominent model
10:19:02 5 confidentiality/non-disclosure agreements include
10:19:07 6 provisions for either the unilateral or bilateral
10:19:10 7 non-solicitation of the negotiating parties' employees."

10:19:16 8 Do you see that?

10:19:17 9 A. Yes.

10:19:17 10 Q. And the sentence preceding that which I began
10:19:20 11 to read was, "A telling measure of consensus best
10:19:21 12 practices --"

10:19:22 13 A. Yes.

10:19:22 14 Q. "-- is provided by such agreements."

10:19:24 15 Do you see that?

10:19:26 16 A. Yes, I do.

10:19:27 17 Q. And the support for this assertion is -- that
10:19:30 18 you provided in your report here, is footnote 23,
10:19:34 19 correct?

10:19:35 20 A. Yes.

10:19:42 21 MR. HARVEY: Please mark Plaintiffs'
10:19:44 22 Exhibit 2923.

10:19:58 23 THE REPORTER: 2923.

10:20:11 24 (Exhibit 2923 was marked for identification.)

25 //

10:20:11 1 BY MR. HARVEY:

10:20:11 2 Q. And Exhibit 2923 is the document to which you
10:20:13 3 cite in footnote 23, right?

10:20:16 4 A. Yes, it appears to be.

10:20:27 5 Q. And if you go to the first page of the
10:20:30 6 document --

10:20:31 7 A. Yes.

10:20:31 8 Q. -- it is the "Model Merger Agreement for the
10:20:33 9 Acquisition of a Public Company."

10:20:36 10 Do you see that?

10:20:36 11 A. Correct.

10:20:37 12 Q. Do you have any evidence in this case that any
10:20:39 13 defendant considered merging with any other defendant?

10:20:49 14 A. It's unclear to me one way or the other. It's
10:20:52 15 certainly possible that there were negotiations about --
10:20:56 16 many times a merger negotiation may start as a joint
10:21:01 17 venture negotiation. So -- but I haven't seen direct
10:21:06 18 statements about potential mergers.

10:21:08 19 This -- this model agreement has both the
10:21:13 20 definitive merger agreement in it, and then a series of
10:21:16 21 other attendant agreements that often will long predate a
10:21:20 22 merger agreement.

10:21:28 23 Q. Okay. You cite to pages 341 to 371, correct?

10:21:33 24 A. Yes.

10:21:33 25 Q. And are those pages contained in -- in

10:21:37 1 Exhibit 2923?

10:21:39 2 A. They -- this appears to be a -- a version -- an
10:21:44 3 abbreviated version of the ABA -- of the ABA model
10:21:50 4 agreement or agreements, and the part that is included
10:21:55 5 here after the cover page is the model confidentiality
10:21:58 6 agreement.

10:22:00 7 Q. And these are the pages you cited in note 23,
10:22:04 8 are they not?

10:22:05 9 A. It appears that they are, yes.

10:22:07 10 Q. And if you go to page 341 --

10:22:09 11 A. Yes.

10:22:09 12 Q. -- the first sentence in bold is, "The Model
10:22:12 13 Confidentiality Agreement and Commentary is the
10:22:15 14 confidentiality agreement related to the Model Merger
10:22:19 15 Agreement." Do you see that?

10:22:20 16 A. Yes.

10:22:21 17 Q. Okay. And if you go to page 342 --

10:22:32 18 A. Yes.

10:22:33 19 Q. -- of the document, under the heading, "TYPICAL
10:22:36 20 PROVISIONS," there is a subheading -- or I should say the
10:22:40 21 text begins, "At a minimum, a confidentiality agreement
10:22:44 22 normally covers the following points:" And it lists six
10:22:50 23 bullet points, correct?

10:22:54 24 A. Let me count. One, two, three, four -- yes,
10:22:57 25 six bullet points.

10:22:58 1 Q. Is prohibiting the solicitation of employees
10:23:01 2 any of those bullet points?

10:23:03 3 A. It is not in those six.

10:23:05 4 Q. Then the next section says, "Other provisions
10:23:09 5 that may be included in a confidentiality agreement
10:23:11 6 depend upon the varying factual circumstances in which
10:23:15 7 the agreement arises and may include:" and then it lists
10:23:19 8 three bullet points, correct?

10:23:20 9 A. That is correct.

10:23:23 10 Q. And the provision regarding solicitation of
10:23:25 11 employees is that first bullet point, correct?

10:23:28 12 A. Yes.

10:23:39 13 Q. Now, if you could go ahead to page 366 of that
10:23:45 14 same exhibit, where -- Section 11, the heading is
10:23:51 15 "Non-Solicitation," do you see that?

10:23:53 16 A. Yes.

10:23:59 17 Q. And in the model agreement it says that, "Each
10:24:01 18 party to this letter agreement agrees that, for a period
10:24:05 19 of two years from the date hereof," and so forth. Do you
10:24:10 20 see that?

10:24:11 21 A. Yes, I do.

10:24:12 22 Q. Okay. And then if you go to the commentary,
10:24:20 23 I'd like you to look at the second sentence there, where
10:24:25 24 it says, "This is most often the target's concern, and
10:24:29 25 the concern is most likely to be present in the case of

10:24:32 1 smaller companies and technology or other companies where
10:24:36 2 there are a few key employees who have valuable knowledge
10:24:39 3 and skills or who are especially important to the
10:24:43 4 company's customer relations."

10:24:45 5 Do you see that?

10:24:45 6 A. I do see this, yes.

10:24:47 7 Q. And then the next sentence reads: "Many buyers
10:24:50 8 will object to non-solicitation provisions, particularly
10:24:54 9 ones that purport to apply to employees of the buyer who
10:24:59 10 do not even know about the possible transaction with the
10:25:02 11 target." Do you see that?

10:25:03 12 A. I do, yes.

10:25:05 13 Q. Okay. And then following that section, the
10:25:10 14 comment lists potential ways to address that concern from
10:25:14 15 the buyer. Do you see those bullets? There are one,
10:25:18 16 two, three, four of them.

10:25:20 17 A. Yes.

10:25:21 18 Q. And the first one is to "reduce the
10:25:23 19 non-solicitation period," correct?

10:25:25 20 A. Yes.

10:25:26 21 Q. And that would be reducing it from two years to
10:25:29 22 something shorter, correct?

10:25:30 23 A. One would assume, correct.

10:25:31 24 Q. Okay. And the second bullet is to "limit the
10:25:34 25 provision to the employees or other representatives of

10:25:37 1 the buyer who are involved in (or possibly aware of) the
10:25:42 2 possible transaction." Do you see that?

10:25:44 3 A. Yes.

10:25:45 4 Q. And then the third bullet is, "limit the
10:25:48 5 provision to a specific subset of the target's employees,
10:25:54 6 with such subset being defined by a specific list or
10:25:58 7 category (for example, officers, employees" -- or I
10:26:04 8 should say, "officers, employees at the level of vice
10:26:07 9 president or above, key technical or salespersons, or
10:26:11 10 persons identified in the due diligence and negotiation
10:26:14 11 process)."

10:26:15 12 Do you see that?

10:26:15 13 A. Yes.

10:26:16 14 Q. Okay. Okay. You can put that aside.

10:26:27 15 A. Okay.

10:27:00 16 Q. Moving to a different topic, in conducting your
10:27:02 17 analysis, did you consider whether there were potentially
10:27:07 18 less restrictive versions of the agreements at issue in
10:27:11 19 this case that would still serve the -- the other
10:27:17 20 purposes you described in your report?

10:27:20 21 A. Can you give me an example? That might help.

10:27:24 22 Q. Sure. So, for example, instead of the
10:27:26 23 agreements being with respect to all employees from the
10:27:33 24 chef to the administrative assistant to the software
10:27:35 25 engineer, that the agreements would be tailored to

10:27:37 1 certain groups of employees who would be part of the
10:27:40 2 collaboration issue?

10:27:42 3 A. And does this question envision that there
10:27:44 4 would be a single collaboration or a series of them?

10:27:49 5 Q. Let's stick for now to one specific
10:27:52 6 collaboration.

10:27:53 7 A. And should we stick to one that is on a
10:27:55 8 discrete project, say a technical set of -- I don't know,
10:27:59 9 protocols on a particular software program or -- I'm just
10:28:05 10 trying to get a sense of the scope of -- scope is an
10:28:08 11 issue in my opinion. So I just want to get a sense of
10:28:10 12 the nature of the question.

10:28:12 13 Q. Sure. Well, you know, I guess why don't I
10:28:16 14 start with sort of a more general question, which is for
10:28:19 15 any of these contexts, did you consider in your report
10:28:23 16 less restrictive alternatives for accomplishing any of
10:28:26 17 the particular collaborations you point to, viewed in
10:28:31 18 isolation? And let's just stick with that for now.

10:28:34 19 A. Yeah. So I did with a caveat, which is that
10:28:39 20 the -- the possibility of a less restricted prohibition
10:28:45 21 would, in that instance, that raised by your question, be
10:28:51 22 on sort of a project by project basis. Right?

10:28:55 23 So we've got project X. Here are key employees
10:28:59 24 with project X. And we can identify exactly who they are
10:29:05 25 going to be, and we can draw a line around them. And if

10:29:09 1 we have project Y we'll do the same thing again. We'll
10:29:14 2 negotiate the terms of that arrangement. So that was
10:29:16 3 something that I considered.

10:29:17 4 Q. Okay. And what was your conclusion with
10:29:18 5 respect to starting with one specific collaboration?

10:29:22 6 A. The main conclusion is that the nature of the
10:29:25 7 non-solicitation agreement that one would expect would be
10:29:30 8 related to the scope and -- and the prospective scope and
10:29:34 9 breadth of the nature of the collaborations between the
10:29:37 10 parties.

10:29:38 11 So if it were very clear that the parties were
10:29:41 12 going to have, on an ongoing basis, multiple forms of
10:29:46 13 collaborations across different domains, then it would
10:29:49 14 be -- the comparison would be to have a -- what would be
10:29:55 15 essentially, you know, a set of ground rules that -- that
10:29:59 16 governs all of them versus trying to negotiate to bear
10:30:04 17 the transaction's cost of negotiate -- negotiating what
10:30:07 18 those parameters are going to be on a project by project
10:30:11 19 basis.

10:30:11 20 And from an economic efficiency perspective, it
10:30:15 21 can be the case that if the anticipated scope, breadth,
10:30:19 22 length, and depth of a collaboration is sufficiently
10:30:24 23 strong, it makes more sense to try to reach a general set
10:30:27 24 of ground rules, a single one, than to try to renegotiate
10:30:30 25 that in every -- at the inception of every different

11:06:47 1 A. All right. So Campbell is sort of a, you know,
11:06:51 2 an informal advisor to -- to -- to Mr. Schmidt during a
11:06:57 3 fair amount of this time, and -- and this is all -- this
11:07:02 4 is in part because Google is still a growing company,
11:07:05 5 from what I understand, trying to give Schmidt a sense
11:07:09 6 of, you know, how to -- how to scale, how to grow, what
11:07:13 7 sorts of -- of, you know, strategic maybe human resources
11:07:18 8 issues are likely to be confronted as -- as one is
11:07:22 9 growing, regulatory clearance issues and so forth.

11:07:27 10 One possibility, and it seems quite plausible
11:07:32 11 in this -- in this situation, is that Campbell might say,
11:07:35 12 hey, listen, if you've got an, you know, issue related
11:07:38 13 to, I don't know, OSHA compliance or some other
11:07:42 14 regulatory issue, we've got a -- we've got a pretty good
11:07:46 15 regulatory person, I think we found the right way to do
11:07:49 16 it. Let me put your people in touch with that person so
11:07:53 17 you can -- they can give you a sense of how we did it.
11:07:55 18 Or maybe a Sarbanes --

11:07:59 19 Q. We'll stop there --

11:08:01 20 A. Yeah.

11:07:59 21 Q. -- just so I can -- you got to stop at some
11:07:59 22 point.

11:08:02 23 MR. RUBIN: Can we take a very short break,
11:08:04 24 actually?

11:08:05 25 THE WITNESS: I'd be happy to.

11:08:06 1 MR. HARVEY: Let's just finish this little
11:08:07 2 segment.

11:08:09 3 MR. RUBIN: Okay.

11:08:10 4 MR. HARVEY: I'll be quick, though, if I can.

11:08:12 5 MR. RUBIN: All right.

11:08:12 6 BY MR. HARVEY:

11:08:13 7 Q. So you gave an example of Campbell pointing to
11:08:18 8 someone at Intuit who might have some expertise on OSHA
11:08:23 9 compliance.

11:08:24 10 A. Or Sarbanes-Oxley compliance.

11:08:26 11 Q. Sure. And so the measurement comes in terms of
11:08:29 12 he would -- he might not do that, and so you would tally
11:08:32 13 up --

11:08:34 14 MR. RUBIN: No pun intended.

11:08:35 15 BY MR. HARVEY:

11:08:35 16 Q. -- the times when he would -- the times when he
11:08:36 17 would give advice versus when he wouldn't, and but for
11:08:40 18 the agreements we have some number?

11:08:42 19 A. Yeah, you might try to get a sense of, okay,
11:08:43 20 when that happened, at what level of -- of direct contact
11:08:47 21 did -- you know, would he put them in touch with this
11:08:51 22 person or say, I'm going to -- I'm going to go try and
11:08:52 23 find out and I'll give you a few -- a few hints what I
11:08:55 24 can find out. Or maybe not do it as frequently as he
11:08:59 25 would have otherwise with knowing that -- that Google

11:09:03 1 wasn't going to turn around and -- and cold call that
11:09:06 2 person in to recruit them in.

11:09:07 3 And so I think it's both kind of the level of
11:09:11 4 access, the degree of specificity, and the frequency of
11:09:15 5 that kind of an access, are the dimensions that I guess
11:09:18 6 I'd be interested in.

11:09:19 7 Q. And you -- you'd be interested in it. Have
11:09:22 8 you, in fact, done that analysis?

11:09:24 9 A. I have not.

11:09:25 10 Q. Okay. And in this case, in the case of Bill
11:09:30 11 Campbell, Intuit was a party to an agreement with Google
11:09:34 12 for about two years, correct, 2007, 2009?

11:09:40 13 A. Something like that.

11:09:40 14 Q. Did you try to measure the difference between
11:09:42 15 the amount or the intensity of his advice before the
11:09:45 16 conspiracy period, during and after?

11:09:47 17 A. I did not try to do a quantitative measurement
11:09:51 18 in the way that you're speaking.

11:09:53 19 MR. HARVEY: Okay. Why don't we take a break.

11:09:56 20 THE VIDEOGRAPHER: We are now off the record at
11:09:57 21 2:09 p.m.

11:09:58 22 (Recess was taken.)

11:27:34 23 THE VIDEOGRAPHER: This is Tape 5 of the
11:27:35 24 Deposition of Dr. Eric Talley. We are now on the record
11:27:39 25 at 2:27 p.m.

11:27:42 1 BY MR. HARVEY:

11:27:43 2 Q. Switching topics to board memberships and so
11:27:45 3 forth --

11:27:46 4 A. Yes.

11:27:46 5 Q. -- is it your understanding that the Plaintiffs
11:27:48 6 in this case are attacking the fact of the overlapping
11:27:52 7 boards as themselves being a violation of the law?

11:27:58 8 A. Not quite that directly, but something akin to
11:28:04 9 that, I guess.

11:28:05 10 Q. What do you have in mind in terms of being akin
11:28:08 11 to that?

11:28:09 12 A. You know, I think it's in my report, and -- and
11:28:18 13 so on page 5, "Plaintiffs' conspiracy claims appear to
11:28:24 14 focus on the fact that various Defendant companies had
11:28:27 15 board members who also served on boards of other
11:28:29 16 Defendant companies, or alternatively had some analogous
11:28:30 17 fiduciary duty role in other Defendant companies.
11:28:30 18 Plaintiffs imply that this sort of interrelatedness
11:28:30 19 between corporate entities is anomalous, and was either
11:28:38 20 deliberately created or directly permitted by defendants
11:28:40 21 to effectuate the DNCCs with the goal of suppressing
11:28:45 22 compensation."

11:28:46 23 Q. So that's your understanding --

11:28:46 24 A. Compensation, yes.

11:28:46 25 Q. So that accurately describes your

11:33:50 1 became a less effective board member? And this is
11:33:53 2 specific -- specific evidence that Paul Otellini's
11:33:57 3 service on the Google board became less valuable to
11:34:02 4 Google after 2009.

11:34:04 5 MR. RUBIN: Objection. Form.

11:34:05 6 THE WITNESS: I haven't seen evidence one way
11:34:07 7 or the other on this. It is certainly conceivable,
11:34:11 8 because you've got to remember that the type of advice
11:34:14 9 that board members are going to be giving at any given
11:34:18 10 time is in part going to be predicated against
11:34:20 11 prospectively how will my advice be used?

11:34:24 12 So -- so it seems quite plausible to me, though
11:34:28 13 I haven't seen a document to evidence -- post-2009
11:34:32 14 evidence one way or the other that he has become more or
11:34:35 15 less effective on the Google board.

11:34:37 16 BY MR. HARVEY:

11:34:37 17 Q. Okay. And in Bill Campbell's case, he
11:34:40 18 continues to give advice to Google today, does he not?

11:34:43 19 A. I believe he does.

11:34:44 20 MR. RUBIN: Objection to form.

11:34:45 21 THE WITNESS: Excuse me. I believe he does.

11:34:47 22 BY MR. HARVEY:

11:34:47 23 Q. And I believe in your report you say that when
11:34:49 24 Larry Page replaced Eric Schmidt as a CEO, he started
11:34:55 25 coaching, or continued in maybe a different way, coaching

11:34:59 1 Larry Page, correct?

11:34:59 2 A. Yeah, I've seen documents consistent with that,
11:35:01 3 and it's reflected in my report.

11:35:04 4 Q. Have you seen any evidence -- this is the same
11:35:05 5 question, have you seen any evidence that Bill Campbell's
11:35:07 6 advice to Google has become less effective since 2009?

11:35:11 7 MR. RUBIN: Objection to form.

11:35:11 8 THE WITNESS: Again, I've not seen that
11:35:12 9 evidence. It is a difficult thing to measure. But given
11:35:17 10 that Campbell himself had -- had been worried about the
11:35:22 11 migration out of Intuit, that would reasonably factor in
11:35:28 12 to the type of advice or the depth of advice or the
11:35:31 13 sensitivity of advice he might give to -- to Mr. Schmidt
11:35:35 14 or Mr. Schmidt's successors.

11:35:37 15 BY MR. HARVEY:

11:35:37 16 Q. But you haven't actually assessed that one way
11:35:39 17 or the other, have you?

11:35:40 18 A. I have not tried to assess it quantitatively.

11:35:45 19 Q. And you are aware, are you not, that Bill
11:35:48 20 Campbell is also on the board of Apple?

11:35:52 21 A. Yes.

11:35:53 22 Q. The same question. Do you have any reason to
11:35:56 23 believe that Bill Campbell's advice or value on the Apple
11:36:02 24 board diminished after 2009 because the do-not-call
11:36:07 25 agreements were eliminated?

11:36:09 1 A. And I think it would be the same answer. I
11:36:11 2 would see reason why they -- they might well, but I have
11:36:14 3 not done a quantitative assessment of that.

11:36:17 4 Q. Okay. And this -- the argument you make about
11:36:23 5 the procompetitive benefits of kind of overlapping
11:36:26 6 boards, and I think in other places you refer to it as
11:36:29 7 corporate governance collaboration, is that relevant to
11:36:34 8 the agreement between Pixar and Lucasfilm?

11:36:37 9 A. You know, I haven't studied the agreement
11:36:39 10 between Pixar and Lucasfilm in much depth, so I don't --
11:36:45 11 haven't really rendered an opinion about that. It is
11:36:48 12 relevant, I think, between the Intuit-Google diad.

11:36:53 13 Q. And there is no such overlapping board
11:36:56 14 relationship between Apple and Adobe, is there?

11:37:00 15 A. I don't know one way or the other.

11:37:02 16 Q. Okay. In that section of your report,
11:37:48 17 beginning on page 5, I think it's part IV, you also
11:37:51 18 identify resolving conflicts of interest as a potential
11:37:55 19 benefit of do-not-call agreements, correct?

11:37:58 20 A. Can you point me to where you are --

11:38:01 21 Q. And I'm discussing your -- your argument
11:38:03 22 generally, I'm not trying to tie you to a specific
11:38:05 23 paragraph or anything.

11:38:06 24 A. Okay. I'm just trying to -- yeah, I think you
11:38:17 25 are probably referring to the discussion that begins

11:38:19 1 around page 9.

11:38:29 2 Q. So the question was, is it part of your opinion
11:38:34 3 that the do-not-call agreements resolved -- excuse me --
11:38:39 4 conflicts of interest between these -- these individuals
11:38:45 5 who sat on another company's board and that company?

11:38:50 6 A. So my -- my opinion is that the DNCC guidelines
11:38:56 7 can be viewed as playing a role of helping to mediate
11:39:00 8 potential conflicts of interest in -- in accordance with
11:39:03 9 good governance, principles, and applicable legal rules.

11:39:08 10 Q. What are the conflicts of interest you had in
11:39:09 11 mind here?

11:39:10 12 A. Well, one that we talked about a little earlier
11:39:13 13 is -- is the so-called corporate opportunity doctrine,
11:39:19 14 which concerns the obligations of a director who -- who
11:39:27 15 has learned of or knows about a specific type of business
11:39:30 16 opportunity, that maybe -- maybe is a fiduciary of -- of
11:39:37 17 two firms, and is trying to figure out, do I alert both
11:39:42 18 firms to this business opportunity? Do I allow both of
11:39:46 19 them to -- to pursue the business opportunity? Can I
11:39:54 20 have a set of ground rules which is pretty clear how this
11:39:58 21 category of situations is going to be handled?

11:40:01 22 Q. Are there any other conflicts of interest you
11:40:03 23 have in mind here?

11:40:06 24 A. Well, there -- the -- the -- excuse me.

11:40:10 25 The corporate opportunity doctrine is a subset

11:49:02 1 pre-authorized.

11:49:03 2 Q. Have you seen any evidence in this case that
11:49:05 3 the Google board made such an advanced designation to
11:49:08 4 deal with the conflicts of interest we have been talking
11:49:11 5 about?

11:49:11 6 A. I haven't seen evidence that the board as a
11:49:13 7 whole made that -- that designation one way or the other.

11:49:16 8 Q. Have you seen any evidence that some authorized
11:49:20 9 or, you know, some smaller group of people authorized by
11:49:24 10 the board made such a decision?

11:49:26 11 A. I haven't. The -- the report says it would be
11:49:28 12 fully consistent with this sort of, but I haven't seen
11:49:33 13 evidence one way or the other on this.

11:49:35 14 Q. Have you seen any evidence that the Intel board
11:49:37 15 made such a decision?

11:49:38 16 A. I do not believe I have.

11:49:40 17 Q. Okay. And I'm presuming, because you didn't
11:49:42 18 look at it, the same is true for the other companies.

11:49:45 19 A. Correct.

11:49:45 20 Q. Have you seen any evidence in this case that
11:49:50 21 Paul Otellini informed the board of Google that he had
11:49:53 22 the conflict of interest you identified?

11:49:56 23 A. Well, in -- in some ways, yes. I think the --
11:49:58 24 you know, the -- the site person that he was complaining
11:50:03 25 about is almost saying, "Listen, you are putting me -- by

11:50:09 1 recruiting this person, you are putting me into a
11:50:12 2 conflict of interest."

11:50:13 3 Q. That is Paul Otellini informing the board of
11:50:16 4 Google?

11:50:17 5 A. Well, it is an email. It is not directed
11:50:19 6 towards the board as a whole. But -- but there is a
11:50:21 7 complaint that is lodged by -- by Otellini along these
11:50:24 8 very lines.

11:50:25 9 Q. Have you seen any evidence to suggest that the
11:50:27 10 board of Google was aware of Paul Otellini's conflict and
11:50:32 11 then authorized some resolution of that conflict?

11:50:35 12 A. Not one way or the other, no.

11:50:39 13 Q. Are you aware that Bill Campbell informed the
11:50:43 14 board of Google that he was conflicted on this issue?

11:50:47 15 A. I've not seen evidence one way or the other on
11:50:49 16 that.

11:50:50 17 Q. Okay. You cite to the Shona Brown deposition
11:50:53 18 in your materials considered, correct?

11:50:55 19 A. I believe so, yes.

11:50:57 20 Q. Do you recall reading her deposition where she
11:50:59 21 says that she can't recall a single example of conflicts
11:51:03 22 of interest with Bill Campbell ever coming up?

11:51:09 23 A. It depends what one terms as a "conflict of
11:51:12 24 interest." So the -- it may be that was going through --
11:51:15 25 I think I vaguely remember seeing this, but I'd have to

11:51:19 1 see the text to be sure about the context.

11:51:22 2 Q. Okay. So let's move on to the next paragraph.

11:51:26 3 I think you want to get to it.

11:51:29 4 Let's see. That is in reference to Delaware
11:51:34 5 general corporate law, Section 122 subsection 17. Do you
11:51:41 6 see that?

11:51:42 7 A. Yes.

11:51:42 8 Q. And tell me if I have this right. That section
11:51:46 9 reads: "Renounce, in its certificate of incorporation or
11:51:52 10 by action of its board of directors, any interest or
11:51:56 11 expectancy of the corporation in, or in being offered an
11:52:01 12 opportunity to participate in, specified business
11:52:04 13 opportunities or a specified classes or categories of
11:52:07 14 business opportunities that are presented to the
11:52:08 15 corporation or one or more of its officers, directors, or
11:52:13 16 stockholders." Is that the section you are citing to?

11:52:16 17 A. I believe so, yes. I'm not looking at it
11:52:18 18 myself, but --

11:52:19 19 Q. Sure. Is there anything in that section I read
11:52:23 20 that, as you say here, quote, "particularly encourages
11:52:27 21 interlocking corporate boards to anticipate and establish
11:52:32 22 protocols to govern conflicts of interest"?

11:52:35 23 A. So this was a -- this was a section that is
11:52:37 24 relatively new. It was, I think, promulgated in 2000, as
11:52:44 25 I recall, and it followed on the heels of a number of

11:52:48 1 cases involving overlapping directors who were put in a
11:52:53 2 difficult position about not knowing how to allocate
11:52:56 3 those things -- excuse me, those things meaning corporate
11:53:01 4 opportunities between their two companies.

11:53:03 5 The -- the section was -- and I have actually
11:53:06 6 looked at the legislative history of the section, but it
11:53:09 7 was 10 years ago, so forgive me if I don't remember it
11:53:13 8 clearly, but the section, I believe was, in fact,
11:53:17 9 promulgated to help companies -- to enable and facilitate
11:53:21 10 companies to come with up types of ground rules that
11:53:25 11 would allow for the allocation of corporate opportunities
11:53:28 12 without creating an unmanageable conflict every time one
11:53:33 13 arose.

11:53:34 14 Q. And you do that by having each company renounce
11:53:38 15 its interest?

11:53:39 16 A. Well, it can be -- 122.17 is very broad, right?
11:53:42 17 It could be in a charter, it could be in bylaws, it could
11:53:44 18 be an action of the board of directors. But in principle
11:53:47 19 it would be an action of the board of directors being to
11:53:50 20 delegate someone else, specific managerial issue, and
11:53:54 21 that person essentially exercises the -- the authority of
11:53:58 22 the board.

11:54:07 23 Q. And so is it your understanding that the
11:54:09 24 do-not-call agreements function pursuant to this section
11:54:13 25 to renounce a corporate interest?

11:54:15 1 A. It is not quite what the report says, but --
11:54:17 2 but one of the points that I'm trying to make in the
11:54:19 3 report here is that, you know, by dint of the evolution
11:54:25 4 of corporate law on these types of topics, there has
11:54:29 5 quite recently been a section that has been put into the
11:54:32 6 Delaware code that proactively encourages corporate --
11:54:37 7 corporations and -- and corporate governance procedures
11:54:41 8 to set up ground rules to say, okay, look, this is not
11:54:45 9 going to be yours. This not going to be -- any
11:54:48 10 information I provide you about this you can't -- you
11:54:50 11 can't go after.

11:54:50 12 122.17 is that position. The DNCCs essentially
11:54:55 13 are making the point in the report. They are consistent
11:54:58 14 with that type of -- that type of allocation. That's the
11:55:02 15 point that I was trying to make. I was not trying to
11:55:04 16 make the deeper point that, in fact, there -- they were,
11:55:07 17 you know, each of the, you know, alleged agreements if
11:55:10 18 there were some were specifically related to a particular
11:55:15 19 set of procedures under 144 or 122.17.

11:55:32 20 Q. And so, I'm sorry. It is a little bit unclear
11:55:36 21 to me, just for the record.

11:55:37 22 Do you have an opinion one way or the other of
11:55:39 23 whether -- and I'll stick to Google -- whether Google
11:55:43 24 acted pursuant to Section 17 when it entered in the
11:55:49 25 do-not-call agreement?

11:55:51 1 A. Subsection 17.122?

11:55:53 2 Q. Yes.

11:55:54 3 A. It may be that they did. The point that I'm
11:55:57 4 trying to make in the report is that this type of
11:55:59 5 agreement, if it existed, would be consistent with
11:56:01 6 setting up ground rules in a way that corporate law
11:56:04 7 encourages. The -- the template that I'm trying to --
11:56:09 8 that I'm trying to use here is, here is a set of
11:56:12 9 corporate governance practices. It encourages exactly
11:56:16 10 this kind of ex ante identification of, you know, what --
11:56:21 11 what belongs to one company, what -- what belongs to
11:56:25 12 another, and you have informational, more recruiting
11:56:27 13 opportunities.

11:56:28 14 The DNCC guidelines are consistent with just
11:56:32 15 such an ex ante set of ground rules. I do not render an
11:56:37 16 opinion one way or the other about whether the alleged
11:56:40 17 DNCCs were promulgated pursuant to this or not, that it's
11:56:45 18 essentially saying, look, there are good corporate
11:56:46 19 governance reasons to set out these ground rules in
11:56:53 20 advance.

11:56:55 21 Q. So let's go back for a moment to the conflicts
11:56:57 22 of interest with Paul Otellini and Bill Campbell. Would
11:57:09 23 one way of resolving the conflict of interest have been
11:57:15 24 to create an ethical wall for Paul Otellini, such that,
11:57:20 25 for instance, you know, say the Google board is having a

11:57:24 1 discussion about an important hire, and that important
11:57:28 2 hire is a senior vice president of Intel; at that moment,
11:57:31 3 I think, according to your analysis, Paul Otellini should
11:57:35 4 raise his hand or something and say, "You know, I have a
11:57:37 5 conflict here."

11:57:38 6 Would it be sensible for the board of Google to
11:57:41 7 say, "Okay, we'll deal with this by having you leave the
11:57:44 8 room, and we'll talk about it and have you come back"?

11:57:47 9 MR. RUBIN: Object to form.

11:57:48 10 THE WITNESS: So that would be one way to deal
11:57:49 11 with it. Again, the -- the issue is going to involve to
11:57:52 12 what extent is the frequency and depth of those sorts of
11:57:57 13 conflicts something that can be anticipated at a time.
11:58:00 14 It can be a cumbersome process. It is one that is
11:58:03 15 consistent with -- with corporate governance practices.
11:58:07 16 But one of the -- you know, the difficulties of it is
11:58:12 17 that there may be instances where Otellini leaves the
11:58:21 18 room, and he is not able then to provide the advice that
11:58:24 19 they would like him to provide that would create the
11:58:27 20 potential conflict of interests.

11:58:29 21 So that is one of the problems, here is that if
11:58:31 22 Otellini is, you know, identifying, "This is the person
11:58:33 23 you should be talking to," I guess he could leave the
11:58:36 24 room before he identifies that person, but at that
11:58:38 25 point -- and that will eliminate the conflict of

11:58:41 1 interest, and the board will have nothing to deliberate,
11:58:44 2 because they won't know who this person is.

11:58:48 3 BY MR. HARVEY:

11:58:48 4 Q. Well, okay. Have you seen any -- pardon me.

11:58:53 5 Have you seen any evidence in this case showing
11:59:00 6 that Paul Otellini informed the Google board when such a
11:59:05 7 conflict arose if it did, and then left the room and came
11:59:08 8 back and sort of followed the general procedures that one
11:59:11 9 would associate with an ethical wall?

11:59:14 10 MR. RUBIN: Objection. Form.

11:59:15 11 THE WITNESS: I didn't see any direct evidence
11:59:17 12 of it. It may have happened. But I haven't seen direct
11:59:24 13 evidence one way or the other.

11:59:25 14 BY MR. HARVEY:

11:59:26 15 Q. The same question for Bill Campbell. Have you
11:59:28 16 seen any evidence that Bill Campbell told the Google
11:59:33 17 board, you know, "I have a conflict here. I'll leave the
11:59:36 18 room. And you can make the decision and I'll come back"?

11:59:39 19 A. I haven't seen evidence one way or the other.
11:59:41 20 It seems quite plausible that it might have happened, but
11:59:44 21 I just don't know.

11:59:45 22 Q. So I take it you didn't read the part of the
11:59:48 23 Shona Brown deposition where she said that that, in fact,
11:59:52 24 never happened?

11:59:52 25 A. I read the part of the deposition that said she

11:59:55 1 never had a -- that he never had a conflict of interest.

11:59:57 2 Whether he might have -- or to her knowledge he didn't.

12:00:01 3 Whether he may have absented himself for reasons that she

12:00:07 4 was unaware of is not known to me either, so --

12:00:10 5 Q. I'll just recommend that you read that after

12:00:12 6 the deposition.

12:00:13 7 A. That's fine.

12:00:13 8 Q. It's in there. Okay.

12:00:22 9 If you could go to paragraph 26, which I think

12:00:46 10 is on page 9, right next to where we were just looking,

12:00:55 11 there you -- and I think it extends into -- yes, it does,

12:01:00 12 paragraph 27 as well. You describe the benefits of

12:01:05 13 long-term contractual mechanisms, correct?

12:01:08 14 A. Yes.

12:01:16 15 Q. Is it your opinion that the antisolicitation

12:01:20 16 agreements at issue in this case were long-term

12:01:23 17 contracts?

12:01:25 18 A. Well, it might be possible to interpret them

12:01:28 19 that way. They -- at the very least, you know, the --

12:01:33 20 the -- the problem is that we don't know for sure whether

12:01:36 21 all these things were agreements. Some of them may have

12:01:39 22 been only from one side, which probably would take them

12:01:42 23 out of the realm of being contracts.

12:01:44 24 At the very least a set of guidelines can help

12:01:48 25 shape expectations that -- that, in fact, would have this

12:18:21 1 of how many of these employees would have been required
12:18:24 2 in each one of these. But one of the -- one of the
12:18:29 3 issues here is that the nature of the repetitiveness of
12:18:34 4 these interactions is such that it might have been very
12:18:37 5 difficult to tell at all, other than there might be quite
12:18:40 6 a lot of them.

12:18:42 7 Q. Okay. And the same question as to all of
12:18:47 8 these, have you seen any evidence that expressly links
12:18:50 9 any of these individual collaborations to the -- the
12:18:56 10 antisolicitation agreement between Google and Apple?

12:18:59 11 A. So do you mean expressly links in terms of
12:19:03 12 inside a written instrument that might be called a
12:19:06 13 contract?

12:19:07 14 Q. Yes.

12:19:08 15 A. I have not seen that kind of express link.

12:19:11 16 Q. Have you seen any other express link, such as
12:19:14 17 in deposition testimony?

12:19:15 18 A. I believe that I have seen deposition testimony
12:19:19 19 that -- by numerous parties saying that we were working
12:19:24 20 closely with them. We wouldn't have worked as closely
12:19:27 21 if -- if we thought that they were going to be poaching
12:19:31 22 our employees.

12:19:34 23 Q. We certainly don't have time to go through all
12:19:36 24 of these, but I think --

12:19:38 25 A. I was getting excited.

12:19:40 1 Q. We will go through some of them.

12:19:42 2 A. Okay.

12:19:43 3 MR. HARVEY: All right. I'm going to introduce
12:19:46 4 plaintiffs' Exhibit 2925, which for the record is Bates
12:19:52 5 stamped 231APPLE124988. And I believe this is the one
12:20:18 6 you cite in footnote 36.

12:20:21 7 (Exhibit 2925 was marked for identification.)

12:20:31 8 THE WITNESS: Let me just triangulate in here.
12:21:06 9 I think this is it, yeah.

12:21:07 10 BY MR. HARVEY:

12:21:08 11 Q. If you could turn to page 2 of the document --

12:21:10 12 A. All right.

12:21:13 13 Q. Well, first, I'm sorry. Let me just for the
12:21:15 14 record describe it. This document is entitled, "License
12:21:18 15 Agreement Between Google, Incorporated, and Apple
12:21:22 16 Computer, Incorporated," correct?

12:21:24 17 A. Sorry. Yes.

12:21:29 18 Q. And in the recital section in the first page --
12:21:34 19 I'm sorry, the first page I'm still there -- it describes
12:21:37 20 that the purpose of this contract is at the parties'
12:21:42 21 desire to enter into an agreement to license certain
12:21:45 22 software from Google to Apple, correct?

12:21:47 23 A. And where are you reading this?

12:21:49 24 Q. Under the "Recitals" heading on the first page.

12:21:52 25 A. Yes, "It is the Parties' desire to enter into

12:21:55 1 an agreement to license their software, Google to Apple,
12:21:57 2 from source code form pursuant to the terms and
12:22:00 3 conditions set forth below."

12:22:02 4 Q. Now, if you could turn to page 2 --

12:22:04 5 A. Yes.

12:22:05 6 Q. -- there Section 1.9 --

12:22:08 7 A. Yes.

12:22:09 8 Q. -- defines what the agreement takes
12:22:11 9 "confidential information" to mean, correct?

12:22:14 10 A. Yes. It looks like it is a definition of
12:22:15 11 "confidential information."

12:22:17 12 Q. And this describes different forms of
12:22:19 13 intellectual property, correct?

12:22:25 14 A. It may be broader than that, actually.

12:22:27 15 Q. Sure. But it includes it, correct?

12:22:35 16 A. It probably includes it, yes.

12:22:37 17 Q. And it also includes other forms of
12:22:40 18 confidential business information, such as in little
12:22:44 19 Roman ii, [REDACTED], correct?

12:22:47 20 A. Yes.

12:22:49 21 Q. Okay. And if you could turn to page 14, there
12:23:03 22 in -- all right. There section 9 of the agreement is
12:23:10 23 entitled, "Confidentiality," correct?

12:23:13 24 A. Yes.

12:23:13 25 Q. And without getting into the details,

12:23:19 1 subsections 9.1 and 9.2 describe [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED], correct?
12:23:28 4 A. So let's see. [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] 23:45 7 Q. So is that a yes?
12:23:46 8 A. Yes. I just -- I restated your question to be
12:23:48 9 accurate with the paragraph.
12:23:49 10 Q. Okay. And if you could turn to page 18 --
12:23:54 11 A. Yes.
12:23:55 12 Q. -- and Section 13.12, there is that [REDACTED]
[REDACTED] [REDACTED] again, isn't there?
12:24:05 14 A. Yes. There is another [REDACTED] on -- in
12:24:09 15 13.12.
12:24:11 16 Q. Okay. And you've -- presumably you've reviewed
12:24:19 17 this document before citing to it, if you need to read
12:24:24 18 through the whole thing, let me know, but anywhere in
12:24:27 19 this contract does it mention the antisolicitation
12:24:30 20 agreements at issue in this case?
12:24:35 21 A. So this is a very long document. I -- as I sit
12:24:38 22 here, I don't believe that it mentions them. But once
12:24:41 23 again, this may be similar to our Apple-Google
12:24:45 24 non-disclosure agreement that we discussed in
12:24:48 25 Exhibit 2924, that -- that there is a question about what

12:24:56 1 would be naturally included in this document, and if a --
12:25:01 2 an agreement that was already a background understanding
12:25:05 3 or agreement was there, it may not be naturally included
12:25:10 4 in this document.

12:25:11 5 Q. And, in fact, it is prohibited by section
12:25:14 6 13.12, isn't it?

12:25:17 7 A. What is prohibited?

12:25:18 8 Q. That some -- some understanding -- some oral
12:25:24 9 prior or contemporaneous understanding is incorporated as
12:25:28 10 part of this agreement.

12:25:29 11 A. Well, there -- there are two caveats to that.
12:25:34 12 One is -- is that under usual rules of interpretation in
12:25:42 13 contracts, if something would not be naturally included,
12:25:45 14 then this -- this may not be deemed a fully integrated
12:25:48 15 agreement, even with a merger clause within it.

12:25:53 16 Second, the -- the interpretation of use or
12:25:59 17 prohibitions may be informed by the existence of other
12:26:05 18 agreements as well, including prior or contemporaneous
12:26:11 19 written or oral agreements.

12:26:13 20 This is, I believe, I can't be sure, I believe
12:26:19 21 this is a contract that is at least executed in
12:26:22 22 California, and it may have a choice of law provision,
12:26:27 23 but I have to read through it to find it.

12:26:31 24 And -- yes, there it is, 13.4, "

12:26:42 25

12:26:52 3

12:27:28 9

12:27:30 10

12:27:35 11

12:27:38 12

12:27:40 13

12:27:42 14

12:27:44 15

12:27:47 16

12:27:51 17

12:28:00 18

12:28:02 19

12:28:05 20

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12:28:14 24

12:28:17 25

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12:28:17 1 A. Yeah. I think I understand the nature of the
12:28:19 2 question. I -- I think we may be able to short-circuit.
12:28:22 3 I believe my answers would be consistent with this. They
12:28:25 4 may be varied in nuance ways, but as I sit here today, I
12:28:30 5 suspect they would be consistent. There's obviously some
12:28:33 6 inexactitude to that expectation, but I believe they
12:28:37 7 would be.

12:28:39 8 Q. Okay. I think I will skip it.

12:28:48 9 For these contracts, Google and Apple thought
12:28:51 10 it worthwhile to sit down and hash out the language in
12:28:54 11 those contracts, correct?

12:28:55 12 A. Probably --

12:28:58 13 MR. RUBIN: Objection. Form.

12:28:59 14 THE WITNESS: Excuse me. Someone hashed these
12:29:01 15 out. They may be drawn from earlier examples, but there
12:29:05 16 clearly seems to be some indication people thought these
12:29:08 17 collaborations were worthwhile proceeding and
12:29:12 18 memorializing.

12:29:13 19 BY MR. HARVEY:

12:29:13 20 Q. And someone considered the issue of
12:29:15 21 confidentiality and creative provisions to address that
12:29:18 22 concern, correct?

12:29:19 23 A. There are some provisions in here that reflect
12:29:22 24 issues of confidentiality.

12:29:25 25 Q. Is it your opinion that these collaborations

12:29:28 1 were so worthless that they would not have been worth
12:29:31 2 doing if they needed a lawyer to spend another two
12:29:35 3 minutes inserting language regarding the antisolicitation
12:29:38 4 agreements?

12:29:39 5 MR. RUBIN: Objection. Form.

12:29:40 6 THE WITNESS: So once again this will go back
12:29:43 7 to an earlier discussion that -- that you and I were
12:29:45 8 having, Mr. Harvey, that I don't have an opinion about
12:29:48 9 whether they would be worthless. There may still be some
12:29:51 10 worth to these collaborations. The depth, intensity, and
12:29:57 11 value created by them may well, and I -- I believe
12:30:01 12 probably would be lower, or it's at least a plausible
12:30:06 13 business judgment that they would be lower if the fear in
12:30:09 14 sharing confidential information were accompanied by a
12:30:12 15 fear that your co-venturer, your counter-party is going
12:30:18 16 to solicit the very employees that you make available to
12:30:21 17 them.

12:30:22 18 BY MR. HARVEY:

12:30:23 19 Q. In drafting those contracts, why, in your view,
12:30:25 20 didn't they have a paragraph talking about a
12:30:28 21 non-solicitation?

12:30:32 22 MR. RUBIN: Objection to form.

12:30:33 23 THE WITNESS: Well, one of the reasons, as I
12:30:35 24 mentioned earlier and I think we discussed, that in sort
12:30:37 25 of a relational contracting scenario, the -- the

12:30:41 1 existence of a set of ground rules may create a backdrop
12:30:45 2 against which you and I negotiate each individual
12:30:48 3 contract. It is not necessarily something one would
12:30:51 4 expect that you would include those backgrounds if they
12:30:56 5 haven't changed during this period of time.

12:30:58 6 So -- so, you know, all else constant, it
12:31:01 7 probably is a good thing to make contracts as short and
12:31:05 8 simple as possible. One of the transaction cost savings
12:31:10 9 attributes from a -- plausible ones from a set of DNCC
12:31:16 10 protocols is that it is unnecessary each time one of
12:31:19 11 these licensing agreements is opened up to identify which
12:31:23 12 employees are going to be most at risk, what investments
12:31:27 13 are going to be most at risk, what information should I
12:31:30 14 be worried about investing in my employees who are going
12:31:33 15 to be engaged in -- in interactions with my counterpart.

12:31:37 16 BY MR. HARVEY:

12:31:38 17 Q. But these individuals, Marissa Mayer on the
12:31:41 18 Google side, Phil Schiller on the other side, no doubt
12:31:45 19 supported by other people, found it worthwhile to put in
12:31:49 20 language about confidentiality, correct?

12:31:51 21 A. I doubt either of them put that language in
12:31:53 22 themselves.

12:31:54 23 Q. Well, they --

12:31:54 24 A. They signed on behalf of the company. And so
12:31:56 25 there is language about confidentiality that describes

12:31:58 1 it. Yes.

12:32:01 2 Q. Why would they rely on the possibility of the
12:32:04 3 parol evidence rule in bringing in the antisolicitation
12:32:09 4 agreement? That's sort of -- that is pretty risky from
12:32:16 5 their perspective, is it not?

12:32:18 6 MR. RUBIN: Objection to form.

12:32:19 7 THE WITNESS: Yeah, it may or may not be. So,
12:32:21 8 for example, let me just make sure that is the case --
12:32:30 9 yes, so, for example, one thing that they -- there are a
12:32:33 10 few issues on, say, damages if -- if the -- if the
12:32:37 11 agreement is breached. And there is issues relating to
12:32:41 12 indemnification provisions, there are issues relating to
12:32:44 13 a liquidated damages or stipulated damages provision.

12:32:47 14 One thing that is not in here is -- that I see,
12:32:52 15 but it may be here that I'm missing, but I don't see it
12:32:55 16 in here, is a stipulation in the agreement that -- that
12:32:59 17 expectation damages will be the measure by which damages
12:33:02 18 are measured, if there is a breach of contract. All
12:33:05 19 right? And that's a background rule of contract law. I
12:33:08 20 guess you could put it in here, but you don't have to.

12:33:14 21 And on some level, sort of a micro level, that
12:33:16 22 also, in my opinion, is what some of the DNCCs are doing
12:33:22 23 as well. They are creating a background set of
12:33:24 24 conditions. Maybe you put it in there, maybe not. But
12:33:28 25 if they are there as a background set of conditions, it

12:33:31 1 is not a necessary inclusion in this document as well.

12:33:38 2 BY MR. HARVEY:

12:33:39 3 Q. You cite to some violations of the do-not-call
12:33:41 4 agreements, correct?

12:33:44 5 A. Yes.

12:33:44 6 Q. For example, one such violation results in the
12:33:47 7 termination of a Google recruiter, correct?

12:33:49 8 A. I recall seeing that document, yes.

12:33:52 9 Q. Did Apple file a lawsuit seeking expectation
12:33:54 10 damages pursuant to one of these contracts because Google
12:33:57 11 violated the term of the contract by cold calling one of
12:34:02 12 their employees?

12:34:03 13 A. I have not seen any documents that indicated
12:34:05 14 they did. I believe they -- they used termination of the
12:34:10 15 relationship, but I did not see a lawsuit.

12:34:19 16 MR. HARVEY: We are almost running out of tape.
12:34:23 17 Let's go off the record.

12:34:23 18 THE VIDEOGRAPHER: We are now off the record at
12:34:23 19 3:34 p.m.

12:34:23 20 (Recess was taken.)

12:51:03 21 THE VIDEOGRAPHER: This is Tape 6 of the
12:51:05 22 Deposition of Dr. Eric Talley. We are now on the record
12:51:09 23 at 3:50 p.m.

12:51:12 24 BY MR. HARVEY:

12:51:12 25 Q. Switching to the Google-Intel --

13:12:38 1 I understand you took the position of assuming
13:12:39 2 the factual allegations and then doing your analysis from
13:12:39 3 there. Did you assume that there was a common
13:12:42 4 understanding among the defendants?

13:12:44 5 MR. RUBIN: Objection. Form.

13:12:45 6 THE WITNESS: Yeah, we're going to have to see
13:12:48 7 if we can pick that -- pick apart what that means, a
13:12:50 8 common understanding.

13:12:51 9 BY MR. HARVEY:

13:12:51 10 Q. Do you understand that plaintiffs' allegations
13:12:53 11 are that these individual agreements, what are often
13:12:57 12 referred to in the case as the bilateral agreements --

13:12:59 13 A. Yeah.

13:12:59 14 Q. -- that they were part of a common
13:13:01 15 understanding among the seven defendants?

13:13:02 16 A. It is not clear to me that they were.

13:13:05 17 Q. And what I'm asking is, do you understand that
13:13:07 18 Plaintiffs have alleged that?

13:13:09 19 A. I do understand they have alleged that, yes.

13:13:13 20 Q. But unlike with the individual agreements, you
13:13:15 21 are not assuming the truth of plaintiffs' allegation with
13:13:18 22 respect to the common understanding; is that correct?

13:13:20 23 A. Plaintiffs had made an allegation about the
13:13:22 24 common understanding. I'm not assuming the truth of
13:13:24 25 that. It -- in fact, that is part of the nature of the

13:13:31 1 inquiry in the report. There are reasons to think that
13:13:35 2 they did not -- that these -- the DNCC protocols inside
13:13:41 3 Google did not operate the same way between companies.

13:13:52 4 Q. The same way between companies? Which
13:13:53 5 companies are you referring to?

13:13:54 6 A. So, for example, it's pretty clear from some --
13:13:59 7 some documents that I've seen, or from the documents that
13:14:03 8 I have seen, that at least some of the DNCC protocols at
13:14:09 9 Google, and I believe that Intuit is one of them, I think
13:14:11 10 Genentech might have been another, do not appear to be
13:14:17 11 bidirectional, that they appear to be unidirectional,
13:14:21 12 and -- and that the counter-party would be free to cold
13:14:25 13 call Google employees.

13:14:35 14 Q. Genentech is not a Defendant in this case, is
13:14:38 15 it?

13:14:39 16 A. Not to my knowledge.

13:14:40 17 Q. Are you advancing an alternative theory in
13:14:44 18 terms of how the agreements spread from one company to
13:14:48 19 another to include all defendants in this case?

13:14:52 20 MR. RUBIN: Objection. Form.

13:14:55 21 THE WITNESS: You know, I guess -- and I say
13:14:57 22 this some -- in my report, I think when I'm critiquing
13:15:02 23 Professor Marx -- Marx' report that -- that the
13:15:07 24 observation of an emergent practice need not be the
13:15:14 25 product of a common purpose or a conspiratorial or

13:15:22 1 otherwise collective decision. It can be the aggregation
13:15:25 2 of individual decisions. And -- and the evidence I've
13:15:28 3 seen in this case suggests that these DNCC protocols at
13:15:32 4 Google were serving different roles for different -- for
13:15:36 5 different parties, and it had -- it treated companies in
13:15:43 6 gradated ways within its internal hiring protocols.

13:15:51 7 BY MR. HARVEY:

13:15:53 8 Q. So your point is that an emergent practice need
13:15:58 9 not be the product of a common purpose, but you did not
13:16:01 10 form an opinion either way in this case of whether the
13:16:04 11 agreements at issue in this case are the result of a
13:16:07 12 common understanding.

13:16:09 13 MR. RUBIN: Objection. Form.

13:16:11 14 THE WITNESS: Well, I'm -- I'm skeptical of
13:16:13 15 that. It's -- can I dismiss the possibility entirely?
13:16:18 16 Probably not. But I -- I would be skeptical that these
13:16:22 17 types of agreements, the way that they are structured,
13:16:24 18 the way that they -- or alleged agreements, the way that
13:16:30 19 the DNCC listed all over time would be consistent with
13:16:35 20 a -- you know, a -- a common purpose to -- to suppress
13:16:41 21 compensation and mobility.

13:16:43 22 BY MR. HARVEY:

13:16:44 23 Q. You didn't focus on the first such agreement,
13:16:49 24 Pixar to Lucasfilm, correct?

13:16:51 25 A. I did not.

13:16:51 1 Q. And you did not focus on the communications
13:16:53 2 between Ed Catmull, the head of Pixar, and Steve Jobs at
13:16:57 3 Apple, did you?

13:16:58 4 A. I did not.

13:16:58 5 Q. And you didn't try to map out how the
13:17:01 6 agreements spread from one company to another over time,
13:17:05 7 did you?

13:17:05 8 A. Only to the extent that it involves the
13:17:07 9 companies that -- that are connected according to
13:17:09 10 plaintiffs' complaint with Google and other defendants.

13:17:12 11 MR. HARVEY: Okay. All right. So back from
13:17:16 12 the tangent, onto Google-Intuit. Can you please mark
13:18:22 13 this exhibit as Plaintiffs' Exhibit 2928. It is a
13:18:26 14 contract between Google and Intuit entitled, "The Google
13:18:34 15 Software Distribution Agreement." It's Bates stamped
13:18:38 16 Google 625464.

13:18:40 17 (Exhibit 2928 was marked for identification.)

13:18:58 18 THE REPORTER: Exhibit 2928.

13:19:14 19 BY MR. HARVEY:

13:19:14 20 Q. This is an agreement between Google and Intuit,
13:19:17 21 correct?

13:19:17 22 A. It appears to be, yes.

13:19:21 23 Q. Okay. If you could turn to page -- I don't see
13:19:43 24 a page. It is Bates stamped 25466. I direct --

13:19:50 25 A. Yes.

13:19:50 1 Q. -- your attention to Section 4.1.

13:19:53 2 A. Yes.

13:19:55 3 [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

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[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

13:54:16 1 empirical assessment of that.

13:54:22 2 Q. Have you done anything -- well, strike that.

13:54:27 3 Have you done an empirical assessment to

13:54:30 4 determine that the quality of information conveyed by a

13:54:35 5 job posting is the same as the information conveyed by a

13:54:39 6 cold call?

13:54:42 7 A. I have not tried to look into that question,

13:54:45 8 no.

13:54:46 9 Q. Okay. If you could turn to page 31 of your

13:54:51 10 report, and specifically paragraph 88.

13:55:02 11 A. Yes.

13:55:02 12 Q. And that paragraph says, "Moreover, Professor

13:55:06 13 Marx extrapolates his research findings into a very

13:55:10 14 different context. His papers are written about patents

13:55:14 15 in Michigan in the 1980s, with a strong connection to the

13:55:21 16 phenomena occurring in the automotive industry of that

13:55:25 17 time. Applying the findings to the fast-paced innovation

13:55:30 18 and rapidly evolving collaboration of the Silicon Valley

13:55:35 19 in the 21st century appears to be a stretch, and Marx

13:55:39 20 presents no convincing reason to accept the analogy."

13:55:42 21 Do you see that?

13:55:43 22 A. I do.

13:55:44 23 Q. When you are referring to "Professor Marx'

13:55:47 24 papers," are you referring to the two papers that you

13:55:50 25 cite in footnotes 113 and 114?

13:55:53 1 A. Yes, I am.

13:55:54 2 Q. Is it your understanding that those papers are
13:55:59 3 limited to an investigation of patents in Michigan in the
13:56:05 4 1980s?

13:56:06 5 A. That is their focus. The empirical approach
13:56:10 6 that is used in the papers is drawing on a pool of
13:56:14 7 patentees that I believe goes across states. They -- the
13:56:21 8 idea, the study design in the -- and I'll refer most
13:56:25 9 directly to the Marx, Strumsky, and Flemming paper, which
13:56:28 10 is cited in 114, attempts to -- to get a sense in the --
13:56:40 11 endeavors to treat non-Michigan jurisdictions as kind of
13:56:45 12 a placebo test tube group and to think of a statutory
13:56:51 13 change in Michigan as being a treatment group, and they
13:56:54 14 do what is known as a differences in differences
13:56:57 15 statistical approach, to -- to assess it. So their focus
13:57:02 16 is on Michigan. I believe, though, that they do try to
13:57:06 17 utilize data from other states, including California.

13:57:12 18 Q. And that data begins in 1975 and runs all the
13:57:17 19 way through 2006, does it not?

13:57:19 20 A. That sounds about right, yes.

13:57:25 21 Q. And I believe you mentioned there were other
13:57:27 22 states that were included in that analysis. There were,
13:57:29 23 in fact, ten other states, including California, correct?

13:57:33 24 A. I believe that's right. I'd have to look at
13:57:35 25 the paper, but in order to do the differences in

13:57:37 1 differences approach, you need both a control group and a
13:57:41 2 treatment group. So given that the -- that the
13:57:43 3 legislative reform in Michigan was evidently statewide,
13:57:47 4 the one way to approach that is to say, all right, we're
13:57:50 5 going to look at non-changing states and compare them to
13:57:53 6 Michigan, which was a changing state, I think, in 1985.
13:57:56 7 I think that was when the -- when the reform to this
13:58:01 8 other area of law concerning non-competes took place.

13:58:04 9 Q. And that's a comparison Dr. Marx makes,
13:58:07 10 correct?

13:58:08 11 A. He draws an analogy between his research on
13:58:11 12 non-compete provisions and do-not-cold-call protocols.

13:58:16 13 Q. I'm talking about his paper now.

13:58:17 14 A. Yes.

13:58:20 15 Q. His --

13:58:21 16 A. I'm sorry. His report tries to draw an
13:58:22 17 analogy. His paper -- the -- the two papers, and again,
13:58:26 18 predominantly this Management Science paper, is this
13:58:30 19 empirical investigation of non-competes.

13:58:33 20 Q. And that paper makes it clear, does it not,
13:58:37 21 that the patents at issue concerning the automotive
13:58:39 22 industry consist of less than one-tenth of the patents he
13:58:44 23 investigated, correct?

13:58:45 24 A. I can't remember that offhand, but it is
13:58:47 25 certainly a possibility. The -- you know, when -- when

13:58:50 1 you think of the concentration of the automotive industry
13:58:53 2 in Michigan and then ten other states, my best estimate
13:58:57 3 would be they should be about one-eleventh, right,
13:59:02 4 because there are 11 states and, you know, but you have
13:59:05 5 to have control for the size of the state and so forth.

13:59:55 6 Q. Moving on to his 2011 paper, did you read that
13:59:58 7 before citing to it?

14:00:00 8 A. Yes, I did.

14:00:02 9 Q. And that paper included interview data that
14:00:06 10 Dr. Marx conducted personally in 2009, correct?

14:00:10 11 A. I believe so, yes.

14:00:12 12 Q. And the individuals he interviewed were located
14:00:15 13 in several states, including California, correct?

14:00:17 14 A. I think that is correct, yes.

14:00:18 15 Q. And he also conducted a nationwide survey of
14:00:26 16 individuals in a variety of industries across the
14:00:29 17 country, correct?

14:00:30 18 A. I believe that's correct, yes.

14:00:55 19 MR. HARVEY: I'm going to introduce Plaintiffs'
14:01:01 20 Exhibit 2929. And it is a paper that Dr. Marx wrote in
14:01:08 21 2011, entitled, "The Firm Strikes Back - Non-Compete
14:01:12 22 Agreements and the Mobility of Technical Professionals."

14:01:15 23 (Exhibit 2929 was marked for identification.)

14:01:31 24 BY MR. HARVEY:

14:01:32 25 Q. Please let me know once you've confirmed that

14:01:34 1 this is the paper you cite in footnote 116.

14:02:14 2 A. Yes. This appears to be the paper that I cite.

14:02:16 3 Q. Okay. If you can go to page 700 of that
14:02:19 4 paper --

14:02:22 5 A. I will stipulate that that 700 is the journal
14:02:25 6 issue. It is not that long. Actually, you know what,
14:02:28 7 I'm not going to. You're going to have to give me a --

14:02:30 8 Q. Is that the wrong --

14:02:32 9 A. A different --

14:02:33 10 MR. RUBIN: It doesn't have those page numbers.

14:02:36 11 THE WITNESS: Maybe you can use one of the
14:02:37 12 copies you handed to us.

14:03:06 13 MR. HARVEY: It appears to be --

14:03:06 14 THE WITNESS: It is possible that this is a
14:03:08 15 reprint that was paginated in a different way than a copy
14:03:12 16 that would be photocopied out of the journal itself.

14:03:18 17 MR. HARVEY: That is correct. I apologize.

14:03:20 18 THE WITNESS: This is a downloaded paper. The
14:03:21 19 one you have may be a photocopy paper.

14:03:24 20 BY MR. HARVEY:

14:03:24 21 Q. Go to page 6 of the exhibit, please.

14:03:27 22 A. I'll go back 794 pages. All right, there it
14:03:29 23 is.

14:03:30 24 Q. Under the section "Data Sources", " do you see
14:03:32 25 that?

14:03:33 1 A. Yes.

14:03:33 2 Q. If you go to the end of that section, in the
14:03:36 3 final sentence, Dr. Marx wrote that he began by
14:03:41 4 conducting 52 in-depth interviews drawn from a random
14:03:46 5 sample of technical professionals in a single industry.

14:03:50 6 A. Yes.

14:03:50 7 Q. He then surveyed 1,200 -- I'm sorry, 1,029
14:03:54 8 technical professionals across a variety of industries.
14:03:58 9 Do you see that?

14:03:58 10 A. I do see that, yes.

14:04:00 11 Q. And do you see that in that first paragraph of
14:04:05 12 the next section, on the same page, that the industry in
14:04:10 13 which he conducted the 52 in-depth interviews was the
14:04:14 14 automatic speech recognition industry, "in which
14:04:17 15 intellectual property protection plays a critical role in
14:04:21 16 establishing competitive advantage."

14:04:24 17 A. Yes.

14:04:42 18 Q. Turn to the next page, where it says, "Cross
14:04:44 19 Industry Survey," Dr. Marx writes, "While selection of a
14:04:49 20 single industry for the in-depth interviews may help
14:04:51 21 control for extraneous variation, the findings general --
14:04:55 22 generalized ability may be questioned if the ASR industry
14:05:01 23 is idiosyncratic."

14:05:04 24 A. Yes.

14:05:04 25 Q. Therefore he conducts, and I'm paraphrasing,

14:05:08 1 his larger survey. Do you see that?

14:05:10 2 A. Yes.

14:05:11 3 Q. And do you see in that section that the survey
14:05:18 4 was in conjunction with the Institute of Electrical and
14:05:22 5 Electronics Engineers, a non-profit technical
14:05:26 6 professional association with 215,000 members?

14:05:30 7 A. Yes.

14:05:32 8 Q. And if you drop down to the next paragraph, do
14:05:34 9 you see that he sent out invitations to participate in
14:05:38 10 the survey to 5,000 randomly selected members?

14:05:42 11 A. Yes, I do.

14:05:44 12 Q. The response rate was 20.6 percent. Do you see
14:05:46 13 that?

14:05:47 14 A. I see that as well.

14:05:48 15 Q. And that yielded 1,029 useable survey
14:05:52 16 responses. Do you see that?

14:05:53 17 A. Yes.

14:05:53 18 Q. And then at the end of the paragraph, those
14:05:56 19 responses were distributed amongst several industries,
14:05:59 20 the largest being software, 20.5 percent; the second
14:06:03 21 largest being information technology, 15.4 percent; the
14:06:07 22 third being automotive, 14 percent; the next
14:06:11 23 semiconductors, 12.7 percent; the next consumer
14:06:16 24 electronics, 12.2 percent; after that, aerospace and
14:06:23 25 aeronautics, 8.9 percent; computer hardware, 5.8 percent;

14:06:30 1 biomedical, 5.5; and then other, 5 percent.

14:06:36 2 Do you see that?

14:06:37 3 A. I do see that, yes.

14:06:39 4 Q. Okay. Now, going back to what you wrote in
14:06:49 5 paragraph 88 --

14:06:50 6 A. Yes.

14:06:51 7 Q. -- the final sentence of that paragraph, where
14:06:53 8 you wrote, "Applying the findings to the fast paced
14:06:56 9 innovation and rapidly evolving collaboration of the
14:07:00 10 Silicon Valley in the 21st century appears to be a
14:07:02 11 stretch."

14:07:03 12 A. Yes.

14:07:03 13 Q. Do you still hold that view that that is an
14:07:05 14 appropriate sentence?

14:07:07 15 A. I think this -- the strongest data that
14:07:11 16 Mr. Marx has, or that Professor Marx has, is in the
14:07:15 17 Management Science piece. The survey is unable to get a
14:07:22 18 causal -- or make a claim about causal relationships.
14:07:28 19 The -- the -- that said, the American Sociological Review
14:07:35 20 paper does sweep over a large number of different
14:07:39 21 industries, and it's not just IT, in fact, automotive, I
14:07:44 22 think it was 14 percent of the industries surveyed in
14:07:47 23 that paper as well.

14:07:49 24 Q. So you wouldn't change that sentence sitting
14:07:51 25 here today?

14:07:51 1 A. Well, I think that -- I think I might make it
14:07:55 2 more explicit that -- that the finding in particular in
14:07:58 3 the Management Science piece is clearly a stretch. There
14:08:02 4 are other reasons why I'm concerned about even the ASR,
14:08:08 5 the American Sociological Review paper and its
14:08:13 6 applicability here as well.

14:08:17 7 Q. So it's your testimony today, Dr. Talley, that
14:08:20 8 what Dr. Marx did is a stretch, but citing to a paper
14:08:24 9 about long-term coal contracts is not a stretch?

14:08:28 10 MR. RUBIN: Objection to form.

14:08:28 11 THE WITNESS: Yeah, I think the biggest problem
14:08:30 12 for -- for Dr. Marx is that his papers are about
14:08:33 13 non-compete agreements. The Management Science paper has
14:08:38 14 a big problem in it as well that's related to
14:08:41 15 automotive -- automotive industry dynamics, but the fact
14:08:45 16 that his research is about non-compete agreements, and
14:08:50 17 these are, in fact, not non-compete agreements, I
14:08:54 18 apologize for the double negative, but instead
14:08:57 19 do-not-cold-call guidelines, leads me to think his
14:09:03 20 analogy is in opposite across any industry. All right?

14:09:07 21 It -- it is particularly so with the Management
14:09:11 22 Science piece.

14:09:13 23 BY MR. HARVEY:

14:09:14 24 Q. Is it your testimony that long-term coal
14:09:17 25 contracts is a better analogy than non-compete agreements

14:09:21 1 in the tech sector?

14:09:23 2 MR. RUBIN: Objection. Form.

14:09:28 3 THE WITNESS: The proposal is not on square

14:09:30 4 footing with itself. The question is whether a Joskow

14:09:34 5 article that has become a famous article in the field

14:09:38 6 because of its generality is a good analogy to long-term

14:09:42 7 relational contracting, and the purposes that it was

14:09:45 8 cited for are to designate just how long this knowledge

14:09:49 9 has been around, I think makes it an excellent analogy.

14:09:53 10 The question of whether Dr. Marx' contributions

14:09:57 11 to the literature, first dealing with a statutory change

14:10:00 12 in Michigan dominated by the automotive industry and then

14:10:05 13 a survey with a 20 percent response rate across multiple

14:10:09 14 industries as to non-compete agreements, is for a

14:10:13 15 different proposition, and I view it as less applicable.

14:10:18 16 BY MR. HARVEY:

14:10:19 17 Q. Okay. Well, I think we disagree with you on

14:10:20 18 that point, but I won't argue with you here today.

14:10:50 19 Could you turn to page 19 of your report,

14:10:52 20 paragraph 53.

14:10:58 21 A. Yes.

14:10:59 22 Q. And in paragraph 53, you look at hiring rates

14:11:04 23 from December 2004 to December 2009, correct?

14:11:09 24 A. Correct.

14:11:12 25 Q. That span of time is almost exactly coincident

14:11:17 1 with the conspiracy period, is it not?

14:11:19 2 A. I believe that's why I selected that period of
14:11:21 3 time, just to get a sense of whether Google was -- its
14:11:25 4 rate of hiring.

14:11:32 5 Q. Well, at the end of paragraph 53 you say in the
14:11:35 6 last sentence that, "Apple, Intel, and Intuit - even when
14:11:42 7 aggregated with other companies on Google's DNC list -
14:11:47 8 represented only a small fraction of Google's recruiting
14:11:50 9 sources." Do you see that?

14:11:51 10 A. I do see that, yes.

14:11:52 11 Q. And that was during the conspiracy period,
14:11:54 12 correct?

14:11:55 13 A. Yes. I -- during the alleged conspiracy
14:11:57 14 period, I -- there was, you know, sort of a -- you've got
14:12:04 15 to figure out what snapshot that you take, but I think
14:12:06 16 yes, that is a reasonable inference to make.

14:12:09 17 Q. And this is during a period of time in which
14:12:11 18 Google's -- and this is in your paragraph, "Google's
14:12:15 19 full-time employee base grew from 3,021 to 19,835,"
14:12:21 20 correct?

14:12:22 21 A. Correct.

14:12:23 22 Q. That is a pretty effective conspiracy, correct?

14:12:27 23 A. That looks like it's a pretty effective
14:12:29 24 company.

14:12:30 25 Q. Well, you say that despite this enormous rate

14:12:35 1 of hiring, Apple, Intel, and Intuit represented only a
14:12:40 2 small fraction of Google's recruiting sources.

14:12:42 3 A. That's correct.

14:12:42 4 Q. And that's an effective conspiracy, is it not?

14:12:46 5 MR. RUBIN: Objection. Form.

14:12:47 6 THE WITNESS: No. That is testament to just
14:12:48 7 how large this set of markets is.

14:12:51 8 MR. HARVEY: I request that Mr. Philips cease
14:12:54 9 laughing after my questions in order to tell the witness
14:12:57 10 what to do.

14:13:00 11 MR. PHILLIPS: I don't think he needed any help
14:13:01 12 in answering that question, Counsel; I assure you. It
14:13:05 13 wasn't used to make it.

14:13:28 14 BY MR. HARVEY:

14:13:29 15 Q. In footnote 76, you quote Mr. Otellini's
14:13:32 16 testimony, and I'm going to read part of it, that "We, at
14:13:35 17 Intel, don't have in the grand scheme of things that many
14:13:41 18 software people." Do you see that?

14:13:42 19 A. I see that, yes.

14:13:43 20 Q. Did you do anything to determine whether Intel
14:13:45 21 had a lot of software people?

14:13:47 22 A. I did not do a survey of their -- of their
14:13:53 23 employee base. I -- so I did not conduct that -- I think
14:13:59 24 you are getting onto the same question about an empirical
14:14:03 25 analysis. I did not do that. It is notable that Google

14:14:07 1 and Intel are not even classified in the same primary
14:14:12 2 industrial code as one another.

14:14:17 3 Q. Okay. But Mr. Otellini wasn't talking about
14:14:21 4 industrial codes, was he? He was talking about software
14:14:24 5 people?

14:14:25 6 MR. RUBIN: Objection. Form.

14:14:26 7 THE WITNESS: In a sense he was. As I
14:14:27 8 understand it, I guess, that Intel is producing chipsets
14:14:32 9 and semiconductors on chipsets with some software
14:14:39 10 programming embedded within them.

14:14:41 11 To my knowledge, Google was not producing
14:14:44 12 chipsets. They are much more heavily populated by
14:14:48 13 programmers that -- that would be in other, you know,
14:14:53 14 sort of formally designated industrial codes.

14:14:59 15 BY MR. HARVEY:

14:14:59 16 Q. Do you know how many software engineers Intel
14:15:03 17 employed during the conspiracy period?

14:15:05 18 A. I don't believe I have a breakdown of that, no.

14:15:07 19 Q. Do you know what Intel employed in terms of the
14:15:11 20 number of software engineers relative to the other
14:15:15 21 defendants in this case?

14:15:16 22 A. I did not do an empirical assessment of that,
14:15:18 23 no.

14:15:31 24 Q. In paragraph 54, you can go to the top of page
14:15:35 25 20, so it is kind of in the middle of --

14:15:37 1 A. Yes.

14:15:37 2 Q. -- paragraph 54, the first full sentence in
14:15:40 3 paragraph -- I'm sorry. The first full sentence on
14:15:44 4 page 20, as you write, quote, "In order to find
14:15:47 5 commonality among the Defendants, Plaintiffs have to
14:15:53 6 aggregate them artificially into a 'high-tech' category."
14:16:00 7 Do you see that?

14:16:01 8 A. Yes.

14:16:02 9 Q. Are you using the word "commonality" in the
14:16:04 10 context of Rule 23?

14:16:06 11 MR. RUBIN: Objection. Form.

14:16:07 12 THE WITNESS: Actually, not quite. I'm using
14:16:09 13 it in the sense of -- of the plaintiffs' allegations as I
14:16:12 14 understand them that -- that the alleged conspiracy was
14:16:18 15 meant to suppress mobility and salaries in the high-tech
14:16:22 16 industries, or industry, but my immediate response to
14:16:28 17 that is, what do we mean by "high-tech industry"?

14:16:31 18 And -- and, you know, then you start asking,
14:16:36 19 well, how would we classify companies? And there are
14:16:40 20 well-accepted classification protocols, which is the next
14:16:43 21 step that Table 1 represents.

14:16:46 22 So this wasn't an endeavor to riff on Rule 23
14:16:51 23 jurisprudence. This was more of a question of, what do
14:16:55 24 we mean, or what do the plaintiffs seem to mean when they
14:16:58 25 talk about high-tech companies?

14:16:59 1 BY MR. HARVEY:

14:17:00 2 Q. These defendants entered into agreements not to
14:17:02 3 recruit each other's employees, correct?

14:17:05 4 MR. RUBIN: Objection. Form.

14:17:06 5 THE WITNESS: As I said earlier, the report
14:17:08 6 stipulates arguendo that these were agreements, but once
14:17:13 7 again, understand that to be in dispute.

14:17:16 8 BY MR. HARVEY:

14:17:17 9 Q. So aggregating the defendants in this case,
14:17:21 10 what's artificial about that?

14:17:25 11 A. A couple of things. First of all, the
14:17:27 12 directionality of the -- of the alleged do-not-cold-call
14:17:29 13 agreements seem not to be -- not to be the same across
14:17:34 14 defendants. As we discussed earlier, the Intuit -- the
14:17:37 15 alleged Intuit-Google do-not-call -- cold call agreement
14:17:42 16 appears to be one way.

14:17:43 17 Second, if one were to place the seven
14:17:47 18 defendants, you know, in a -- in a circle and try --
14:17:50 19 and -- and get a sense of, you know, where the alleged
14:17:54 20 agreements were, you would not fill out every possible
14:17:59 21 line of that circle. They -- they -- not everyone is
14:18:02 22 connected to everyone else. Indeed, Google itself
14:18:06 23 appears only connected to three of the remaining six --
14:18:10 24 six companies by the allegations of the Plaintiffs.

14:18:14 25 So -- so I guess that's the sense in which I

14:18:18 1 was, you know, thinking, well, these are not necessarily
14:18:22 2 the same sets of agreements.

14:18:25 3 Q. Okay. But you didn't study the agreements that
14:18:29 4 did not have Google as a party, correct?

14:18:31 5 A. I did not focus on those agreements.

14:18:33 6 Q. Okay. In the third full sentence on page 20,
14:18:40 7 you say, "Two companies can be both," quote, "high-tech,"
14:18:45 8 unquote, "and yet have no employees with overlapping
14:18:49 9 technical skills." Do you see that?

14:18:51 10 A. Yes.

14:18:52 11 Q. Is it your testimony that any two companies in
14:18:56 12 this case that are party to a no-cold-calling agreement
14:19:00 13 had no employees with overlapping technical skills?

14:19:04 14 MR. RUBIN: Objection. Form.

14:19:05 15 THE WITNESS: No, I don't think that's my
14:19:06 16 testimony. No. It's -- is this a statement of
14:19:09 17 possibility.

14:19:10 18 BY MR. HARVEY:

14:19:10 19 Q. Okay. And what you do in Table 1, these are
14:19:15 20 codes for products, correct? These are codes concerning
14:19:20 21 what these companies are selling.

14:19:23 22 A. The way that industrial sectors are -- are
14:19:27 23 usually organized is through what sort of products are
14:19:31 24 they -- are they selling?

14:19:34 25 So that may not be all of what goes into it,

14:19:37 1 but that is the predominant determination.

14:19:41 2 The companies self-report that in their SEC
14:19:47 3 findings, and so one measure that -- that I examined is
14:19:51 4 what the companies say in their SEC filings; and the
14:19:53 5 other one is the data provider that I used for some of
14:19:57 6 the data I used in the report rolls up a little bit more
14:20:01 7 fulsomely these -- these industrial codes, and tries to
14:20:06 8 get at larger scope. You sort of -- when you fill out an
14:20:11 9 SEC filing, you just have to fill out one of these SIC
14:20:15 10 forms. So I took two measures of it.

14:20:35 11 Q. So you didn't attempt to look at documents
14:20:37 12 produced in the case to determine whether the defendants
14:20:40 13 consider themselves to be competitors for employees,
14:20:43 14 correct, such as evidence concerning salary budgets, you
14:20:51 15 know, comparing their own salary budgets against the
14:20:54 16 salary budgets of the codefendants.

14:20:57 17 MR. RUBIN: Objection. Form.

14:20:58 18 THE WITNESS: Well, one thing that I did do in
14:20:59 19 the report, I don't know if this will answer your
14:21:02 20 question, is to -- to get a sense of if we were to
14:21:06 21 include -- if we were to assume these were all
14:21:09 22 competitors for the same employees, then it would be
14:21:12 23 reasonable to assume that -- that all other companies,
14:21:17 24 and I think I limit it to Bay Area companies with more
14:21:21 25 than a thousand employees, also would be within the

14:21:25 1 potential field of competitors for the same employees.

14:21:29 2 And I think Figure 2 in the -- in the report

14:21:36 3 gives a -- a graphical description. Exhibit 2. Excuse

14:21:43 4 me.

14:21:43 5 BY MR. HARVEY:

14:21:44 6 Q. Okay. Switching topics to the DOJ

14:22:03 7 investigation, do you understand that the DOJ conducted

14:22:06 8 an investigation into -- into agreements among defendants

14:22:10 9 to restrict solicitation?

14:22:12 10 A. I do understand that there was an

14:22:14 11 investigation, yes.

14:22:16 12 Q. Do you have any sense of the volume of

14:22:19 13 documents the defendants produced to the Department of

14:22:21 14 Justice in the course of that investigation?

14:22:24 15 MR. RUBIN: Objection. Form.

14:22:25 16 THE WITNESS: I'm not sure I saw a -- a

14:22:29 17 tabulation of documents produced to the DOJ.

14:22:32 18 BY MR. HARVEY:

14:22:37 19 Q. Have you reviewed the Department of Justice's

14:22:42 20 competitive impact statement?

14:22:45 21 A. Not in any depth, certainly not factoring into

14:22:49 22 this report.

14:22:51 23 Q. Is there a reason why you didn't review the

14:22:56 24 DOJ's conclusions in forming your own opinions?

14:22:59 25 MR. RUBIN: Objection. Form.

14:23:01 1 THE WITNESS: Well, the DOJ was, you know --
14:23:05 2 the consent decree and the DOJ statements were part of
14:23:11 3 a -- sort of a retrospective set of -- of legal filings
14:23:16 4 that -- that embody a particular assessment.

14:23:20 5 The thing that I was trying to look for is, at
14:23:24 6 the time that there were inclusions on the DNCC list at
14:23:30 7 Google, did it make -- was it -- did it make plausible
14:23:34 8 business sense as to why those companies that were
14:23:37 9 included would be included.

14:23:43 10 And so the retrospective nature of the -- of
14:23:45 11 the DOJ approach is -- is one that is less salient from
14:23:51 12 the standpoint of, does this make business sense as a way
14:23:54 13 to set up ground rules to govern an ongoing relational
14:24:01 14 set of contacts or collaboration?

14:24:03 15 BY MR. HARVEY:

14:24:04 16 Q. So your report isn't a retrospective report
14:24:07 17 that evaluates the facts at issue in this case, it is a
14:24:09 18 forward-looking analysis about what we should do in the
14:24:12 19 future?

14:24:13 20 MR. RUBIN: Objection. Form.

14:24:14 21 THE WITNESS: No. The report is meant to say,
14:24:16 22 does this -- are there plausible efficiency-enhancing
14:24:21 23 reasons to enter into agreements or protocols that would
14:24:28 24 restrict cold calling, and -- and if there are, do the
14:24:32 25 facts of this case as I understand them seem more

14:24:36 1 consistent with those efficiency-enhancing rationales
14:24:39 2 than with a conspiracy to suppress wages, salaries, and
14:24:45 3 mobility.

14:24:46 4 And -- and the sort of measuring stick for
14:24:49 5 doing that is -- is broadly a sense of what were the --
14:24:55 6 you know, what were the plausible concerns that the
14:24:57 7 parties might have, how did they design these
14:25:01 8 do-not-cold-call protocols, and -- and what was the
14:25:06 9 nature of the relationships they had in collaborating
14:25:10 10 with these other companies?

14:25:12 11 BY MR. HARVEY:

14:25:13 12 Q. And are you aware that there is a section of
14:25:16 13 the DOJ competitive impact statement entitled, "The
14:25:19 14 agreements were naked restraints and not ancillary to
14:25:23 15 achieving legitimate business purposes"?

14:25:26 16 A. I believe that that is the -- the DOJ's -- that
14:25:31 17 was the DOJ's position, their legal position, yes.

14:25:34 18 Q. You didn't bother to review that position in
14:25:37 19 coming up with your own report, did you?

14:25:40 20 MR. RUBIN: Objection. Form.

14:25:41 21 THE WITNESS: Like I said, the mandate of my
14:25:47 22 report as I understood it was to focus on the evolution
14:25:49 23 of the DNCC protocols and the context under which they
14:25:54 24 were developed. So I guess I would disagree with that
14:25:57 25 view. They don't seem to me like naked restrictions with

14:26:00 1 no competitive or efficiency based rationale. In fact, I
14:26:04 2 can see many efficiency based rationales.

14:26:07 3 So I guess you can agree to disagree with me,
14:26:11 4 and I can agree to disagree with the DOJ. Does that make
14:26:14 5 you agree with the DOJ?

14:26:17 6 BY MR. HARVEY:

14:26:17 7 Q. I agreed with the DOJ before this deposition,
14:26:20 8 and my opinion is unchanged.

14:26:44 9 Did you review the consent decree?

14:26:46 10 A. You know, I think I glanced at it. It was not
14:26:49 11 a principal part of what informed my report.

14:26:53 12 Q. Okay. Are you aware that the consent decree,
14:26:56 13 which defendants stipulated to, and which was entered by
14:27:01 14 U.S. District Court in DC on March 17th, 2011, has a
14:27:07 15 section entitled, "Prohibited Conduct," which states that
14:27:10 16 "Each Defendant is enjoined from attempting to enter
14:27:14 17 into, entering into, maintaining, or enforcing any
14:27:18 18 agreement with any other person to in any way refrain
14:27:22 19 from, requesting that any person in any way refrain from,
14:27:27 20 or pressuring any person in any way to refrain from
14:27:32 21 soliciting, cold calling, recruiting, or otherwise
14:27:35 22 competing for employees of the other person."

14:27:38 23 Are you aware of that?

14:27:39 24 A. I don't believe that was the whole provision,
14:27:41 25 but I think I have seen that provision, yes.

14:27:43 1 Q. I'm getting to the rest.

14:27:44 2 A. Okay.

14:27:45 3 Q. So you have seen that provision.

14:27:46 4 A. I think I have come across it. Yeah.

14:27:50 5 Q. And in the conduct not prohibited, which I

14:27:53 6 think is what you are thinking of, are you aware that

14:27:56 7 there are provisions which the defendants have agreed to

14:27:59 8 and which have been entered as a final judgment, limiting

14:28:03 9 what antisolicitation agreements the defendants may enter

14:28:06 10 into that are -- that are in either written form or in

14:28:09 11 unwritten form?

14:28:11 12 A. I believe I have that recollection, yes.

14:28:14 13 Q. Okay. And the variety of a requirement, such

14:28:18 14 as, "one, identify with specificity the agreement to

14:28:24 15 which is ancillary," correct?

14:28:27 16 A. I'm sorry. I lost you there. Requirement?

14:28:30 17 Q. Sure. Are one of the requirements of the DOJ

14:28:33 18 consent decree that if the defendants going forward are

14:28:37 19 to enter into an antisolicitation agreement, that one of

14:28:41 20 the requirements -- in its written form, that the first

14:28:45 21 requirement is that it identify with specificity the

14:28:48 22 agreement to which it is ancillary?

14:28:50 23 A. Yes. I think I've seen that. Yes.

14:28:51 24 Q. And the second one is to be narrowly tailored

14:28:55 25 to affect only employees who are anticipated to be

14:28:56 1 directly involved in the agreement.

14:28:59 2 A. I believe I've seen that, yes.

14:29:01 3 Q. And the third is to identify with reasonable
14:29:03 4 specificity the employees who are subject to that
14:29:06 5 agreement?

14:29:07 6 A. I believe I've seen that as well.

14:29:09 7 Q. The fourth is to contain a specific termination
14:29:13 8 date of the event.

14:29:13 9 A. I believe I've seen that.

14:29:14 10 Q. And the fifth is to be signed by all parties to
14:29:17 11 the agreement, including any modifications to the
14:29:19 12 agreement.

14:29:20 13 A. I think I've seen that as well, yes.

14:29:22 14 Q. Do you have any reason to think that the
14:29:24 15 defendants have violated this consent decree since they
14:29:28 16 agreed to it?

14:29:29 17 MR. RUBIN: Objection. Form.

14:29:30 18 THE WITNESS: I don't have reason to believe
14:29:31 19 they violated it, no.

14:29:33 20 BY MR. HARVEY:

14:29:35 21 Q. Are you aware that the next section of the
14:29:37 22 consent decree is entitled, "Required Conduct," whereby
14:29:41 23 "the Defendants are required to furnish a copy of the
14:29:44 24 Consent Decree to their Corporate Officers, Directors,
14:29:49 25 Human Resource Managers, and Senior Managers who

14:29:52 1 supervise employee recruiting, soliciting or hiring"?

14:29:57 2 A. Vaguely. I'm not sure I focused as much on
14:29:59 3 that part of it. I didn't spend a lot of time with the
14:30:02 4 consent decree.

14:30:03 5 Q. Okay. And the consent decree requires that all
14:30:09 6 the people I just mentioned be annually briefed on the
14:30:12 7 consent decree and briefed on the meaning and
14:30:15 8 requirements of the antitrust laws. Are you aware of
14:30:18 9 that?

14:30:19 10 A. Again, same answer as before. I think I've
14:30:21 11 probably come across that language. Again, it didn't
14:30:25 12 factor centrally into my report.

14:30:27 13 Q. Are you aware that within 60 days of receipt of
14:30:30 14 the final judgment, all those people I mentioned are
14:30:33 15 required to certify three things: One, that that person
14:30:37 16 has read and to the best of their ability understands and
14:30:40 17 agrees to abide by the terms of the consent decree; two,
14:30:45 18 is not aware of any violation of the final judgment that
14:30:49 19 has not been reported to the defendant; and, three,
14:30:52 20 understands that any person's failure to comply with the
14:30:55 21 judgment may result in an enforcement action for civil or
14:30:59 22 criminal contempt against each Defendant and/or any
14:31:03 23 person who violates the consent decree? Were you aware
14:31:07 24 of that?

14:31:08 25 MR. RUBIN: Objection. Form.

14:31:09 1 THE WITNESS: Same -- same answer as before. I
14:31:12 2 think I have come across that language. I wasn't
14:31:14 3 focusing on it in writing this report.

14:31:17 4 BY MR. HARVEY:

14:31:17 5 Q. And the next section is entitled, "Compliance
14:31:20 6 Inspection," whereby the DOJ has rights to, during
14:31:25 7 regular business hours, inspect and copy, or at the
14:31:29 8 option of the United States, to require each Defendant to
14:31:33 9 provide electronic or hard copies of all books, ledgers,
14:31:36 10 accounts, records, data, and documents in the possession
14:31:41 11 or control of each Defendant, and to interview, either
14:31:47 12 informally or on the record, the defendants' officers,
14:31:52 13 employees, and so forth.

14:31:53 14 Were you aware of that?

14:31:55 15 A. Again, I'm going to give you the same answer as
14:31:57 16 before. I -- you know, I thumbed through the consent
14:32:00 17 decree. Did not spend a large amount of time on it in
14:32:04 18 developing this report.

14:32:04 19 Q. So you testified that you have no reason to
14:32:10 20 think the defendants have violated this consent decree
14:32:13 21 since agreeing to it, correct?

14:32:15 22 A. I have no evidence one way or the other.

14:32:21 23 Q. You don't think that the defendants agreed to
14:32:23 24 this as evidence that they probably abided by it?

14:32:27 25 MR. RUBIN: Objection. Form.

14:32:28 1 THE WITNESS: Presumably they agreed to it in
14:32:30 2 2011, right?

14:32:32 3 BY MR. HARVEY:

14:32:33 4 Q. Well, it was entered in 2011. They agreed to
14:32:35 5 it earlier. In fact, you don't know when they did agree
14:32:38 6 to it, do you?

14:32:40 7 A. I'm not sure I've seen those documents.

14:32:42 8 Q. Yeah, they are not listed in your materials
14:32:43 9 considered.

14:32:44 10 So knowing that, and the provisions I've read
14:32:48 11 to you, is there a reason why you stopped your analysis
14:32:58 12 when these companies agreed to the consent decree?

14:33:04 13 MR. RUBIN: Objection. Form.

14:33:05 14 THE WITNESS: Well, the nature of the
14:33:06 15 plaintiffs' allegations concern a conspiracy period that
14:33:09 16 I believe goes between 2005 and 2009. So that was the
14:33:14 17 focus of my report.

14:33:17 18 BY MR. HARVEY:

14:33:18 19 Q. Given the opinions you've stated in your
14:33:19 20 report, would you expect that the defendants would have
14:33:25 21 found it unduly burdensome to comply with the consent
14:33:28 22 decree?

14:33:30 23 A. They may well --

14:33:31 24 MR. RUBIN: Objection to form.

14:33:32 25 THE WITNESS: Excuse me. I'm sorry. They may

1 I, Rosalie A. Kramm, Certified Shorthand
2 Reporter licensed in the State of California, License No.
3 5469, hereby certify that the deponent was by me first
4 duly sworn and the foregoing testimony was reported by me
5 and was thereafter transcribed with computer-aided
6 transcription; that the foregoing is a full, complete,
7 and true record of said proceedings.

8 I further certify that I am not of counsel or
9 attorney for either of any of the parties in the
10 foregoing proceeding and caption named or in any way
11 interested in the outcome of the cause in said caption.

12 The dismantling, unsealing, or unbinding of the
13 original transcript will render the reporter's
14 certificates null and void.

15 In witness whereof, I have hereunto set my hand
16 this day: December 19, 2013.

17 ___X___ Reading and Signing was requested.

18 _____ Reading and Signing was waived.

19 _____ Reading and signing was not requested.

20

21

22

ROSALIE A. KRAMM

23

CSR 5469, RPR, CRR

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25